THE

PRINCIPLES

OF

HINDU LAW

BY

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WITH

(1) EXTRACTS FROM COLEBROOKE, STRANGE, COWELL, BANERJEE, MITTER, MAYNE, SARVADHIKARI. SUTHERLAND &C.;

(2) ACTS RELATING TO HINDU LAW;

(3) A SUMMARY OF THE HINDU LAW

AND

(4) A COPIOUS INDEX.

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A SUMMARY OF THE HINDU LAW.

I. PRELIMINARY REMARKS.

Practically speaking, the forensic law of the Hindus is contained in a number of works by different writers: the principal among which are the *Mitakshara*, the *Dayabhaga*, the *Vivada Chintamani*, the *Vyavahara Mayukha*, the *Kaustabha*, the *Smriti Chandrika*, the *Madhavya* the *Dattaka Mimansa*, the *Dattaka Chandrika*; besides these there are other works, but of less authority. All these works are not followed in every part of India; some are considered as authority in one place and some in another. In Bengal, the *Dayabhaga*; in Mithila, the *Vivada Chintamani*; in Madras and Benares, the *Mitakshara*; in Bombay, the *Mayukha*, are the principal authorities. But no rule of law contained in these treatises should be enforced by a Court of Justice without ascertaining whether it is living law or dead letter. Since clear proof of usage will outweigh the written text of the law.(1) The doctrines contained in the above treatises may be indiscriminately cited, so long as they do not contravene the rules of law which have obtained exclusively in a particular province.(2) The above treatises are based upon the *Vedas*, the *Smritis*, and custom.

Forensic law of the Hindus contained in certain treatises.

(1) The Collector of Madura *v.* Muttu Ramalinga Sathupathy, 10 W. R. (P. C.,) 21.

(2) Cowell's Hindu Law, Vol. i., p. 16; "The Privy Council has repeatedly laid it down that the Mitakshara should be referred to in Bengal for an exposition of the principles of inheritance in cases 'where the Dayabhaga is silent.'"—(*Sarvadhikari*, *p.* 846; *I. L. R.*, 5 *Calc*, 776, *Moniram Kolita* v. *Kerry Kolitanee*.)

Who are governed by Hindu law.

Races who are Hindu by name, or even Hindu by religion,* are not necessarily governed by any of the written treatises on law, which are founded upon, and developed from, the *Smritis* (Mayne, s. 11.)

We should be very careful before we apply all the so-called Hindu Law to all the so-called Hindus. In considering the applicability of that law, we should not be too strongly influenced by an undoubted similarity of usage. (Mayne, s. 13.)

Excepting the Christians, the Muhammadans, the Jews, the Parsis and other foreign settlers, the rest of the population of India may be said to consist of(1) the Aryan-Hindus,† (2) the Dravidian Hindus,‡ and(3) the Aboriginies.‖ All the races comprising the two latter divisions are not governed by Hindu law.

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* Many of the Dravidian races who are called Hindus are worshippers of snakes and devils, and are as indifferent to Vishnu and Siva as are the inhabitants of White Chapel.

† The Aryan-Hindus are connected by descent with the chief nations of Europe. The languages spoken by the different branches of the Aryan-Hindu race are all derived from the Sanskrit, with more or less admixture from other sources. Of these branches the chief are: (1) the *Hindi*-speaking people, in Bihar, the North-West Provinces, Oudh, and the Central Provinces; (2) the *Bengális*, in Bengal and parts of Bihár, Orissa, and Assam, the Assamese language itself being very closely allied to Bengali; (3) the *Mahrattas*, speaking Marathi, in the Bombay Presidency, the Central Provinces, the Central India Agency, and the Barars; (4) the *Gujarati*-speaking people, in the Bombay Presidency and the adjacent parts of Rajputana; (5) the *Uriyas*, in Orissa and the adjacent parts of the Central Provinces and the Madras Presidency; (6) the *Panjabis* in the Panjab; and (7) the *Sindhians*, in Sindh.—LETHBRIDGE.

‡ The Dravidian races are: (1) the *Telugus*, in the northern portions of the Madras Presidency and in the east of the Nizam's dominions; (2) the *Tamils*, throughout the southern portion of the peninsula, speaking the *Tamil* language in the South Carnatic and Travancor, and the Malayalim dialect of that language in Malabar and Cochin; (3) the *Kanarese*, in Kanara and other western portions of the Madras Presidency, and also in Mysore and Coorg, and throughout a considerable part of the Nizam's dominions.—*Ibid.*

‖ The aboriginal tribes are found in the hills and forests of every part of India. Thus there are the Santals, in Bengal; the Bhars, in the North-West Provinces and Oudh; the Gakkhars, in the Panjab; the Gonds, in Central India; the Bhils, in Bombay and Rajputana; the Tudas, in South India; and many others. Many of the lower castes in all parts of India are largely mixed with aboriginal tribes.—*Ibid.*

What law governs the converts.

Hindu law has obligatory force only upon those who are, Hindus both by birth and religion. When a Hindu is converted to Christianity or to Mahometanism, and has shown by his course of conduct after his conversion, what rules and customs he has adopted, he is released from the trammels of Hindu law, and is thenceforth governed by the law and usage of the class with which he has associated himself. Otherwise conversion to Christianity or Mahometanism does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity or Mahometanism has no concern, such as his rights and interests in, and his powers over, property. The convert, though not bound as to such matters, either by the Hindu law, or by any other positive law, may, by his course of conduct after his conversion, show by what law he intends to be governed as to these matters. He may do so, either by attaching himself to a class which, as to these matters, has adopted and acted upon some particular law, or by himself observing some family usage or custom. Nothing could be more just than that the rights and interests in his property, and his powers over it should be governed by the law which he adopts, or the rules which he observes. Since, upon the conversion of a Hindu to Christianity or to Mahometanism, the Hindu law ceases to have any continuing obligatory force upon the convert, so he may renounce the old law by which he was bound, as he has renounced his old religion; or, if he thinks fit, he may abide by the old law, notwithstanding he has renounced the old religion. (*Abraham* v. *Abraham*, 9 Moore's Indian Appeals, p. 195.)

Hindu law, personal and not local law.

Hindu law is a personal and not a local law. A Hindu may import into any country to which he migrates the particular law of his own tribe. Although the presumption is in favour of a Hindu retaining the shasters of his birth, yet the principle has been definitely affirmed, that a Hindu may, if he chooses, change the shasters or school of law by which he wishes to be governed. (*Ranee Pudmavati* v. *Baboo Doolar Sing and others*, 4 Moore's Indian Appeals, p. 259.) The real test to be applied is by what shasters the customs and rites of marriages and funerals are conducted; occasional or daily religious services may be changed without effecting a corresponding change in a Hindu's legal liabilities. (*Koomud Chunder Roy* v. *Seetakant Roy*, Suth. F. B. 75.)

Classification of property under Hindu law.

Property, according to the Hindu law, is of two descriptions, real (or immoveable) and personal (or moveable); which are further distinguished as ancestral and self-acquired. Moreover, the thing itself, whether moveable or immoveable, which is the subject of property, is capable of division into its component parts, whether by division of the thing itself, or of the mode of its enjoyment. The various holdings of immoveable property, or, in other words, tenures in land, are instances of it, and every tenure is as distinct a subject of property as is the land itself. (Cowell's Hindu Law, vol. i., p. 82.)

Power to make alienations.

It is now clearly settled, beyond all further question, that the Hindu law, according to the school of Bengal, makes no distinction between ancestral and self-acquired property as respects the right of alienation by sale, gift, will, or otherwise. Hence, in Bengal, a Hindu who has sons or other heirs can sell, give, or pledge as he pleases, without their consent, immoveable or moveable property, whether ancestral or aquired, and can, by will, prevent, alter, or affect their succession to such property. (*Tagore* v. *Tagore*, 4. B. L. R., O. C., p. 159.)

Except in Bengal, the right of a Hindu in ancestral real property is always limited; any alienation by the occupant, without the consent of all the heirs (*i. e.*, sons, grandsons, and great-grandsons, whose rights in such property are declared to be equal to that of the occupant itself), or made without proof of legal necessity, or of its being made for the benefit of minors, or under such circumstances as to render the father the agent of the family for that purpose, is void. With respect to personal property of every description, whether ancestral or acquired, and with respect to real property acquired or recovered by the occupant, every Hindu is at liberty to make any alienation or distribution which he may think fit, subject only to spiritual responsibility.

II. INHERITANCE.

Succession never in abeyance.

The right of succession under Hindu Law is a right which vests immidiately on the death of the owner of the property. It cannot under any circumstances remain in abeyance in expectation of the birth of a preferable heir, not conceived at the time of the owner's death. A child who is in the mother's womb at the time of the death is, in contemplation of law, actually existing, and will, on his birth, devest the estate of any person with a title inferior to his own, who has taken in the meantime.—(*Mayne*, s. 422; *Sarvadhikari*, p. 892.)

Person competent to offer funeral oblations, entitled to inherit.

The competence of a person to offer funeral oblations forms the test of his title to the inheritance. It is a well-known saying, that "he alone is entitled to the property of the deceased who is competent to present exequial offerings to him." The principle that the right of inheritance, according to Hindu Law, is wholly regulated with reference to the spiritual benefits to be conferred on the deceased proprietor, has been laid down by the highest judicial authority (1). It has been doubted, however, whether this principle is universally true in all the schools of Hindu Law (2). That it is strictly and absolutely true in Bengal is admitted, but it has been asserted that it is not so elsewhere. According to the Mitakshara, it is said, (3) propinquity, and not offerings, is the test of heirship. But as the competence to confer spiritual benefits on the deceased exactly measures the degree of kindred in which a given claimant stands to the late proprietor, and is an infallible guide in determining the preferable right to succession, the principle, that spiritual benefit is the criterion of the right of inheritance, must necessarily be universally true. (4) (*Sarvadhikari*, *pp.* 131, 133,583).

Spiritual benefit, the criterion of the right to inherit.

(1) B. L. R., Amrita Kumari, II, F. B, 28; Gurugovinda Mandul, v, F. B. 15; Govinda Prosad, XV, 35, &c., &c.

(2) Mayne, ss. 9, 423. (3) Mayne, s. 436.

(4) But among the Hindus of the Panjab, the order of succession is determined by custom, and not by spiritual considerations and throughout the Presidency of Bombay, numerous relations, and especially females, inherit, to whom no ingenuity can ascribe the slightest religious merit. (*Mayne*, *s.* 9.)

Two kinds of sraddha.

The *sraddhas* are either individual (*ekoddishta*), or ancestral (*parvana*). All persons who are competent to celebrate *parvana sraddhas* are also entitled to perform *ekoddishta sraddhas*; but the performers of the latter are *not necessarily* entitled to celebrate the *parvana sraddha*. Hence the performers of the *parvana* rites have a preferable claim, and they exclude the performers of any other description of exequial rites. The *parvana sraddha* is a sraddha with a double set of funeral cakes. One cake is offered to the father, one to the paternal grandfather, and one to the paternal great-grandfather. The second set of cakes are given to maternal ancestors, *viz.*, one cake is given to the maternal grandfather, one to the maternal great-grandfather and one to the maternal great great grandfather. The crumbs of the first set are given to the remoter paternal ancestors only (*Sarvadhikari*, pp. 763—765).

Competency of persons to offer oblations determined by fixed rules.

It is not every one who is entitled to present these offerings to the deceased. Even all his blood-relations do not promiscuously enjoy this privilege. There are certain rules, framed with great precision, which determine the order according to which persons are *entitled* to perform the Sraddha rites of their deceased kinsmen. The least deviation from the fixed order invalidates the ceremonies, and no spiritual benefit can be derived from them.

Inefficacy of offerings made by blood relations in contravention of the rules.

Three sorts of funeral offerings.

Mr. Mayne says (s. 424):—"A Hindu may present three distinct sorts of offering to his deceased ancestors; either (1) the entire funeral cake, which is called an undivided oblation, or (2) the fragments of that cake which remain on his hands, and are wiped off it, which is called a divided oblation or (3) a mere libation of water. The entire cake is offered to the three immediate paternal ancestors, *i. e.* father, grandfather, and great-grandfather. The wipings, or *lepa*, are offered to the three paternal ancestors next above those who receive the cake, *i. e.*, the persons who stand to him in the fourth, fifth, and sixth degree of remoteness. The libations of water

are offered to paternal ancestors ranging seven degrees beyond those who receive the *lepa*, or fourteen degrees in all from the offerer; some say as far as the family name can be traced. The generic name of *sapinda* is sometimes applied to the offerer and his six immediate ancestors, as he and all of these are connected by the same cake or *pinda*. But it is more usual to limit the term *sapinda* to the offerer and the three who received the entire cake. He is called the *sakulya* of those to whom he offers the fragments, and the *samanodaka* of those to whom he presents mere libations of water.*** In the first place, sapindaship is mutual. He who receives offerings is the sapinda of those who present them to him, and he who presents offerings is the sapinda of the person who receives them. Therefore, every man stands as the centre of seven persons, six of whom are his sapindas, though not all the sapindas of each other. He is equally the sapinda of the three above, and of the three below him. Further, a deceased Hindu does not merely benefit by oblations which are offered to himself. He also shares in the benefit of oblations which are not offered to him at all, provided they are presented to persons to whom he was himself bound to offer them while he was alive. As Mr. Justice *Mitter* said, 'If two Hindus are bound during the respective terms of their natural life to offer funeral oblations to a common ancestor or ancestors, either of them would be entitled after his death to participate in the oblations offered by the survivor to that ancestor or ancestors; and hence it is that the person who offers those oblations, the person to whom they are offered, and the person who participates in them, are recognized as sapindas of each other.'" (*Mayne*, s. 424.)

Who is *Sapinda.*

Who is *Sakulya.*

Who is *Samanodaka.*

The sapindas just described are all *agnates*, that is persons connected with each other by an unbroken line of male descent. But there are other sapindas who are *cognates*, or connected by the female line. (*Mayne*, s. 425) Bandhus, in the language of the Mitakshara, are sapinda relations not

Who are *agnates.*

Who are *cognates.*

Who are *bandhus.*

belonging to the same *gotra* or family as the deceased proprietor. In other words, bandhus are those persons who are related by blood, as sapindas to the deceased, *on the female side*. Bandhus then are cognate sapindas. (*Sarvadhikari*, p. 688.)

Principles of precedence among heirs.

As to the grounds upon which one heir is preferred to another, the following rules may be laid down. (*Mayne*, s. 432)

1. Each class of heirs takes before, and excludes the whole of, the succeeding class. The *sapindas* are allowed to come in before the *sakulyas*, because undivided oblations are considered to be of higher spiritual value than divided ones; and the *sakulyas* are in their turn preferred to the *samanodakas*, because divided oblations are considered to be more valuable than libations of water.

2. The offering of a cake to any individual constitutes a superior claim to the acceptance of a cake from him, or the participation in cakes offered by him. On this ground the male issue, widow, and daughter's son rank above the ascendants, or the brothers who offer exactly the same number of cakes as the deceased.

3. Those who offer oblations to both paternal and maternal ancestors are superior to those who offer only to the paternal. Hence the preference of the whole to the half-blood.

4. Those who are competent to offer funeral cakes to the paternal ancestors of the deceased proprietor, are invariably preferred to those who are competent to offer such cakes to his maternal ancestors only; and the reason assigned for the distinction is, that the first kind of cakes are of superior religious efficacy in comparison to the second. And this rule extends so far as to give a preference to one who offers a smaller number of the superior oblations over one who offers a larger number of the inferior sort.

5. Similarly, those who offer larger numbers of cakes of a particular description are invariably preferred to those who offer a less number of cakes of the same description; and where the number of such cakes is equal, those that are offered to nearer ancestors are always preferred to those offered to more distant ones.

The same remarks are equally applicable to the *sakulyas* and *samanodakas*.

Order of Succession.

(*a*) All legitimate sons,* living in a state of union with their father at the time of his death, succeed equally to his property, real and personal, ancestral and acquired. "If a man has become divided from his sons, and subsequently has one or more sons born, he or they may take his property exclusively."—*Mayne*, s. 460.

(*b*) In default of sons, the grandsons inherit, in which case they take *per stirpes*, the sons, however numerous, of one son, taking no more than the sons, however few, of another son.

(*c*) In default of sons and grandsons, the great-grandsons inherit; in which case they also take *per stirpes*, the sons, however numerous, of one grandson taking no more than the sons, however few, of another grandson. They will take the shares to which their respective fathers would have been entitled had they survived.

* The right of representation is admitted as far as the great-grandson; and the grandson and great-grandson, the father of the one and the father and grandfather of the other being dead, will take equal shares with their uncle and grand-uncle respectively. Indeed, the term *putra* or son has been held to signify, in its strict acceptation, a grandson and great-grandson. An adopted son is a substitute for a son of the body where none such exists, and is entitled to the same rights and privileges.

Where a legitimate son is born subsequently to adoption, he and the son adopted inherit together; but the adopted son takes one-third, according to the law of Bengal, and one-fourth, according to the doctrine of other schools. If two legitimate sons are subsequently born, then, according to the Benares school, the property should be made into seven parts, of which the legitimate sons would take six; and according to the law as current elsewhere, into five shares, of which the legitimate sons would take four, and so on, in the same proportion, whatever number of legitimate sons may be born subsequently.

There is a case on record, in which there were sons by different wives, and one party claimed that the estate should be distributed according to the number of wives, without reference to the number of sons borne by each (a distribution technically termed *patnibhaga*), averring that such had been the *kulachar*, or immemorial usage of the family; but the court determined that the distribution among them should be made, not with reference to the mothers, but with reference to the number of sons; being of opinion that, although, in cases of inheritance, *kulachar*, or family usage, has the prescriptive force of law, yet to establish *kulachar* it is necessary that the usage have been ancient and invariable. In the succession to principalities and large landed possessions, long-established *kulachar* will have the effect of law, and convey the property to one son to the exclusion of the rest. It has been stated by Mr. Colebrooke that the great possessions called *zamindaris*, in official language, are considered by modern Hindu lawyers as tributary principalities.

(*d*) In default of sons, grandsons, and great-grandsons in the male line, the inheritance descends lineally no farther, and the widow inherits.*But her interest is not absolute.

(*e*) In default of the widow, the daughter inherits.† First

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* According to the law of Bengal, the widow inherits, whether her late husband was separated, or was living as a member of an undivided family; but according to other schools, the widow succeeds to the inheritance in the former case only, an undivided brother being held to be the next heir. If there be more than one widow, their rights are equal. If a man die leaving more than one widow (three widows, for instance), the property is considered as vesting in only one individual; thus, on the death of one or two of the widows, the survivor or survivors take the property, and no part vests in the other heirs of the husband until after the death of all the widows. "The widows may be placed in possession of separate portions of the property, either by agreement among themselves, or by decree of Court, where from the nature of the property, or from the conduct of the widows, such a separate possession appears to be the only effectual mode of securing to each the full enjoyment of her rights. But no partition can be effected between them, whether by consent or by adverse decree, which would convert the joint estate into an estate in severalty and put an end to the right of survivorship." Mayne, s. 469. Chastity is a condition precedent to the taking by the widow of her husband's estate. But her rights can not be defeated on the ground of her subsequent incontinence. Mayne, s. 470.

† According to the Bengal school, the unmarried daughter is first entitled to the succession: if there be no maiden daughter, then the daughter who has, and the daughter who is likely to have, male issue, are together entitled to the succession; and on failure of either of them, the other takes the heritage. Under no circumstances can the daughters, who are either barren, or widows destitute or male issue, or the mothers of daughters only, inherit the property.

According to the Benares school, in default of the widow, the maiden daughter inherits. Failing her, married indigent daughters. In default of indigent daughters, the wealthy daughters inherit; but no preference is given to a daughter who has or is likely to have male issue, over a daughter who is barren, or a childless widow.

According to the law of Mithila, there is no distinction among married daughters, whether they are indigent or wealthy, widowed and barren or having or likely to have male issue.

"The above rule of succession is applicable to Bengal in every possible case; but, elsewhere, only where the family is divided: for, according to the doctrine of the Benares and other schools, even the widow, to whom the daughter is postponed, can never inherit, where the family is in a state of union; nor can the mother, daughter, daughter's son, or grandmother. The father's heirs in such case exclude them.

Where daughters of the same class exist, they all, except in Bombay, take jointly in the same manner as widows with survivorship. If at the death of the last survivor another class of daughters exists, who have been previously excluded, they will come in as next heirs, if admissible." Where property is impartible, the eldest of all the daughters, or of the class which takes precedence, is the heir.—Mayne s. 475. The only exception to this rule is thus stated by Mr. MacNaghten: "If one of several daughters, who have as maidens succeeded to their father's property, die leaving sons and sisters or sister's sons, then according to the law of Bengal, the sons alone take the share to which their mother was entitled, to the exclusion of the sisters, or sister's sons."—Mayne, s. 476.

the unmarried, then the married daughters. The interest of the daughter also is not absolute.

(*f*) In default of the qualified daughters, daughter's sons inherit.* They take *per capita*, and not *per stirpes*.

(*g*) In default of daughter's sons, the father inherits, according to the Bengal school.†

(*h*) In default of the father, the mother‡ (but not the step-mother) inherits. Her interest also is not absolute.

(*i*) In default of father and mother, brothers inherit.§

"It has been held in Bengal that the daughter is under the same obligation to chastity as a widow; therefore, as the law is now settled, incontinence will prevent her taking the estate, but will not deprive her of it if she has once taken it. In Bombay, however, it has been held after a full examination of all the authorities bearing on the point, that under the law prevailing in Western India, a widow is the only female heir who is excluded from inheritance by incontinence, and the opinion of the Allahabad High Court seems to be in the same direction." Mayne, s. 473.

* If there be sons of more than one daughter, they take *per capita*, and not, as the son's sons do, *per stirpes*. If one of several daughters, who had, as maidens, succeeded to their father's property, die leaving sons and sisters, or sister's sons, then, according to the law of Bengal, the sons alone take the share to which the mother was entitled, to the exclusion of the sisters and the sisters' sons; and if one of several daughters, who had, as married women, succeeded their father, die leaving sons, sisters, or sisters' sons, according to the same law, the sisters exclude the sons; and if there be no sister, the property will be equally shared by her sons and her sisters' sons. This distinction does not seem to prevail anywhere but in Bengal.

Under no circumstances, can a daughter's son's son or other descendant, or her daughter (except in Bombay) or husband, inherit immediately from her the property which devolved on her at her father's death: such property according to the tenets of all the schools, will devolve on her father's next heir, and will not go as her *stridhan* to her own heir. "Where the estate is impartible, it passes at the death of the last daughter to the eldest of all the grandsons then living and not to the eldest son of the last daughter who held the estate."—Mayne, s. 478.

† But according to other schools, the mother succeeds to the exclusion of the father.

‡ Her interest, however, is not absolute, and is of a nature similar to that of a widow. On her death, the property devolves on the heirs of her son, and not on her heirs. "In Bengal it has been held that the rule which incapacitates an unchaste wife from succession, applies also to a mother."—Mayne, s. 481.

§ First, the uterine associated brethern; secondly, the unassociated brethren of the whole blood; thirdly, the associated brethren of the half-blood; and, fourthly, the unassociated brethren of the half-blood. The above order supposes that the deceased had only uterine or only half-brother, and that they were all united or all separated. But if a man die, leaving an uterine brother separated, and a half-brother associated or re-united, these two will inherit the property in equal shares.

"The Mayukha prefers nephews of the whole to brothers of the half-

(*j*) In default of brothers, their sons inherit.*

(*k*) In default of brothers' sons, their grandsons inherit in the same order, and in the same manner, according to the law as current in Bengal †

(*l*) In default of brother's grandsons, sister's sons inherit according to the law of Bengal.‡

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blood, and its authority is paramount in Guzerat, and the island of Bombay."—Mayne, s. 482.

Sisters are not enumerated in the order of heirs.

A brother's son (his father being dead) is not entitled to inherit together with the brother (*i. e.*, his uncle).

A case occurred in which the deceased left two brothers and a widow, and the widow succeeding, one of the brothers died during the time she held possession. The son of the brother who so died claimed, on the death of the widow, to inherit together with his uncle, and the fallacy of the opinion which maintained the justice of his claim consisted in supposing, that on the death of the first brother the right of inheritance of his other two surviving brothers immediately accrued, and that the dormant right of the brother who died secondly was transmitted to his son. But, in point of fact, while the widow survived, neither brother had even an *inchoate* right to inherit the property, and consequently the brother who died during her life-time could not have transmitted to his son a right which never appertained to himself.

* But in regard to their succession there is this peculiarity, that if a brother's sons, whose father died previously to the devolution of the property, claim by right of representation, they take *per stirpes* with their uncle, being in that case grandsons inheriting with a son; but when the succession devolves on the brother's sons alone as nephews, they take *per capita*, as daughter's sons do.

"The adopted son of a brother succeeds exactly as he would have done if he had been the natural born son of that brother."—Mayne, s. 485. The Maynkha. "allows the sons of a brother of the full blood to succeed before a half-brother, and it appears also to allow the sons of a brother who is dead to share along with surviving brothers."—Mayne s. 484.

† But the law of Benares, Mithila, and other provinces, does not enumerate the brother's grandson in the order of heirs, and assigns to the paternal grandmother the place next to the brother's son.

"The same distinction as to whole and half-blood prevails as in the case of brothers. Of course, he cannot succeed so long as any nephew is alive except by special custom." (In the punjab, nephews and grand-nephews succeed together)—Mayne, s. 486.

‡ But, according to other schools, the paternal grandmother, as above stated, is ranked next to the brother's son, and the sister's son, also is excluded from the enumerated heirs. This point of law was established in a case decided by the Sudder Adawlut, in which the suit being for the landed estate of a deceased Hindu, situated in Bengal, by the son of his sister against the son of his paternal uncle, it was ruled that, according to the law of Bengal, the plaintiff would be heir, but, according to the law of Mithila, the defendent.

There is a difference of opinion among different writers of the Bengal school as to the whole and half-blood; some maintaining that an uterine sister's son excludes the son of a sister of the half-blood; but according to the most approved authorities, there should be no distinction. A sister's daughter is nowhere enumerated in the order of heirs.

(*m*) In default of sister's sons, the inheritance is thus continued agreeably to the doctrine of the Begnal school, as laid down in the *Dayakrama sangruha:*—Brother's daughter's son—Paternal grandfather —Paternal grandmother—Paternal uncle, his son and grandson—Patenal grandfather's daughter's son—Paternal uncle's daughter's son—Paternal great-grandfather —Paternal great-grandmother—Paternal grandfather's brother, his son and grandson—Paternal great grandfather's daughter's son and his brother's daughter's son. On failure of all these, the inheritance goes in the maternal line to the maternal grandfather; the maternal uncle; his son and grandson and daughter's son; the maternal great-grandfather, his son, grandson, great-grandson, and daughter's son; and to the maternal great-great-grandfaher, his son, grandson, great-grandson, and daughter's son. In default of all these, the property goes to the remote kindred in the descending and ascending line, as far as the fourteenth in degree; then to the spiritual preceptor; the pupil; the fellow-student; those bearing the same name; those descended from the same partriarch; Brahmins learned in the *Vedas*; and, lastly, to the king.*

According to the law as current in Benares, in default of the son, and son's son and grandson, the widow (supposing the husband's estate to have been distinct and separate) succeeds to the property under the limited tenure above specified. But if her husband's estate was joint, and held in coparcenary, she is only entitled to maintenance.

In default of the widow, the maiden daughter inherits. In her default, the married indigent daughter. In her default, the married wealthy daughter. Then the daughter's son, but the *Vivadachundra*, the *Vivadaratnakara*, and

* Where there is a failure of heirs the Crown by the general prerogative, will take the property (even of Brahmans) by escheat, but will take it subject to any trusts or charges affecting it. (*Sarvadhikari*, p. 933; I. L. R., 1 Calc. 391; L. R., 3 I. A. p. 92; 8 Moore's I A., 500).

Vivadachintamani, authorities which are current in Mithila, do not enumerate the daughter's son among the series of heirs. The mother ranks next in the order of succession, and after her the father. In default of him, brothers of the whole blood succeed; and in their default, those of the half blood. In their default their sons inherit successively; then the paternal grandmother; next the paternal grandfather; the paternal uncle of the whole blood; of the half blood; their sons successively; the paternal great-grandmother; the paternal great-grandfather, his son and grandson successively; the paternal great-grandfather's mother; his father, his brother, his brother's son. In default of all these, the *sapindas* in the same order as far as the seventh in degree, which includes only one grade higher in the order of ascent than the heirs above enumerated. In default of *sapindas*, the *samanodakas* succeed; and these include the above enumerated heirs in the same order as far as the fourteenth in degree. In default of the *samanodakas*, the *bandhus* or cognates succeed. These kindred are of three discriptions: personal, paternal, and maternal. The personal kindred are, the sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle. The paternal kindred are, the sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle. His maternal kindred are, the sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle. In default of them, the *Acharya* or spiritual preceptor: the pupil, fellow-student in theology, learned Brahmins; and lastly, the estate escheats to the ruling power.*

The order of succession as it obtains in Mithila corresponds with what is here laid down.

* See note in the preceeding page.

The order of succession, agreeably to the law as current in the south of India, does not appear to differ from that of Benares.

In the *Vyavaharámayukha*, an authority of great eminence in the west of India, a considerable deviation from the above order appears; and the heirs, after the mother, are thus enumerated. The brother of the whole blood, his son, the paternal grandmother, the sister, the paternal grandfather, and the brother of the half blood, who inherit together. In default of these, the *sapindas*, the *samanodakas*, and the *bandhus* inherit successively, according to their degree of proximity.

It may be stated, as a general principle of the law as applicable to all schools, that he with whom rests the right of performing obsequies is entitled preference in the order of succession; but there are exceptions to this rule.*

III—EXCLUSION FROM INHERITANCE.

The disqualified persons enumerated by *Menu* are, viz., impotent persons, [outcasts], persons born blind and deaf, mad men, idiots, dumb, and those who have lost a sense or a limb; to which may be added persons affected with grievous and incurable malady, such as leprosy (not in a mild and simple form, but when it assumes a virulent and aggravated type).

"These persons are debarred from their shares, because they are incompetent to perform the religious rites which conduce to the spiritual welfare of the deceased." *Sarvadhikari, 956.*

Blindness, to cause exclusion from inheritance, must be congenital. Mere loss of sight which has supervened after birth is not a ground of disqualification.† Incurable blindness, if not congenital, is not such an affliction as, under the

* For instance, in the case of a widow dying and leaving a brother and daughter her surviving, the daughter takes to the exclusion of the brother, although the exequial ceremonies must be performed by the latter.

† Mahesh Chunder Roy *v.* Ghunder Mohun Roy, 14 B. L. R., 273; Murarji Gokul Das *v.* Parvati Bai. I. L. R., 1 Bomb., 177.

Hindu law, excludes a person from inheritance.* The same remarks apply to those that are deaf or dumb. Their deafness and dumbness, to operate as grounds of disqualification, must be proved to have been congenital and incurable.† *(Sarvadhikari, pp. 956—957.)*

The lame and the cripple, in order to be excluded, must be born so. In like manner, *persons deprived of the use of their hands* must signify such as are destitute of the use of *both* hands from the day of their birth. Insanity and idiocy are grounds of exclusion. "An idiot," says the Madras High Court, "is one of unsound and imbecile mind who has been so *from his birth.* The question of unsoundness and imbecility is to be determined not upon wire-drawn speculations, but upon tangible and unmistakeable facts.‡" The mental incapacity which is to disqualify on the ground of idiocy is not utter mental darkness. If, however, a person is unfit for the ordinary intercourse of life, he is, as to all legal disabilities and incapacities, in the position of an idiot. It is believed that, as madness is more a disease than incapacity of the mind, it must not be placed in the category as blindness, dumbness, idiocy, &c. If it can be simply shown that a party was insane at the time when the succession opened, he is incapable of inheriting.§ Where it is contended that a person is incapable of inheriting by reason of an incurable disease, the strictest proof of the incurability of the disease will be required ‖ Leprosy to be a ground of disqualification, must be of the sanious or ulcerous type.¶ Elephantiasis, atrophy, and marasmus are also mentioned among disqualifying diseases.—*Sarvadhikari, pp. 960—964.*

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* Uma Bai *v.* Pedmanji, I. L. R., 1 Bom., 557.

† Ballabhram Shivnaryan *v.* Bai Hari Ganga, 4 Bomb., H. C., 135; Paresh Mani Dasi *v.* Dinanath Das, 1 B. L. R., 117.

‡ Tirumamagul Ammal *v.* Ramasami Ayyangar, 1 Mad. H. C., 214.

§ Dwarka Nath Bysack *v.* Mahendranath Bysack, 9 B. L. R., 198; Brajabhukan Lall Ahasti *v.* Bichan Dohi, B. L. R., 204. See also 13 Moor. I. A., 519; 14 Moo. I A., 176.

‖ 2. W. R. 125.

¶ Anauta *v.* Rama Bai, I. L. R., 1 Bom., 554. See also Mad. S. C, 1860, p. 238; Janardhun Paudurang *v.* Gopal Basudev Paudurang, 5 Bomb H. C., 145.

As regards loss of caste, it may be observed that any forfeiture of rights on any person on account of his renouncing his religion or being deprived of caste has ceased to be enforced as law.

Food and raiment should be given to the disqualified persons, except to the outcast and his son begotten after his degradation; but the sons of the disqualified persons being free from similar defects shall obtain their father's share of the inheritance.

IV.—STRIDHUN, OR WOMAN'S SEPARATE PROPERTY.

Stridhun has been thus defined by *Menu*:—"What was given before the nuptial fire, what was given at the bridal procession, what was given in token of love, and what was received from a mother, a brother, or a father, are considered as the six-fold separate property of a married woman."

This description of property is not governed by the ordinary rules of inheritance. The succession to it varies according to circumstances. It varies according to the condition of the woman, and the means by which she became possessed of the property.*

* To such property left by an unmarried woman, the heirs are her brother, her father, and her mother successively, and, failing these, her paternal kinsmen in due order.

To such property left by a married woman given to her at the time of her nuptials, the heirs are her daughters; the maiden, as in the ordinary law of inheritance, ranking first, and then the married daughter likely to have male issue. (It may be here mentioned that on the death of a maiden or betrothed daughter on whom the inheritance had devolved, and who proved barren, or on the death of a widow who had not given birth to a son, the succession of the property which they had so inherited will devolve next on the sisters having and likely to have male issue; and in their default, on the barren widowed daughters.) The barren and widowed daughters, failing the two first, succeed as co-heirs. In default of daughters, the son succeeds; then the daughter's son, the son's son, the great-grandson in the male line, the son of a contemporary wife, her grandson and her great-grandson in the male line. In default of all these descendants, supposing the marriage to have been celebrated according to any of the first five forms, the husband succeeds, and the brother, the mother, the father. But if celebrated according to any of the three last forms, the brother is preferred to the husband, and both are postponed to the mother and father. In default of these, the heirs are successively as follows:—Husband's younger brother, his younger brother's son, his elder brother's son, the sister's son, husband's sister's son, the brother's son, the son-in-law, the father-in-law, the elder brother-in-law, the *sapindas*, the *sakulyas*, the *samanodakas*.

Stridhun which has once devolved according to the law of succession which governs the descent of this peculiar species of property ceases to be ranked as such, and is ever afterwards governed by the ordinary rules of inheritance.*

The Hindu law recognizes the absolute dominion of a married woman over her separate and peculiar property, except land given to her by her husband, of which she is at liberty to make any disposition at pleasure. The husband has nevertheless power to use the woman's *peculium*, and consume it in case of distress; and she is subject to his control, even in regard to her separate and peculiar property.

V.—PARTITION.

The father's consent is requisite to partition, and while he lives, the sons have not, according to the law of Bengal, the power to exact it, except under such circumstances as would altogether divest him of his proprietary right,† such as his degradation or his adoption of a religious life.

To such property left by a married woman given to her by her father, but not at the time of her nuptials, the heirs are successively a maiden-daughter, a son, a daughter who has or is likely to have male issue, daughter's son, son's son, son's grandson, the great-grandson in the male line, the son of a contemporary wife, her grandson, her great-grandson in the male line. In default of these, the barren and widowed daughters succeed as co-heirs, and then the succession goes as in the five first forms of marriage.

To such property left by a married woman not given to her by her father, and not given to her at the time of her nuptials, the heirs are in the same order as above, with the exception that the son and unmarried daughter inherit together, and not successively, and that the son's son is preferred to the daughter's son.

* For instance, property given to a woman on her marriage is *stridhun*, and passes to her daughter at her death: but at the daughter's death it passes to the heir of the daughter like other property; and the brother of her mother would be heir in preference to her own daughter, such daughter being a widow without issue.

† But, according to the other school, partition of the ancestral estate may be enforced at the pleasure of the sons, if the mother be past child-bearing, even though the father retain his worldly affections, and though he be averse to partition.

According to the Bengal school, the father may make an unequal distribution of ancestral and acquired property, moveable and immoveable; but cannot make it with respect to ancestral immoveable property and estate, to the acquisition of which his sons may have contributed: of such property the sons are entitled to equal shares; but the father may retain a double share of it, as well as of acquisitions made by his sons.*

In the event of a son being born after partition made by the father, he will be sole heir to the property retained by the father; and if none have been retained, the other sons are bound to contribute to a share out of their portions. There is also another provision which consists in the father's right of resumption, in case of necessity, of the property which he may have distributed among his sons.

At any time after the death, natural or civil, of their parents, the brethern are competent to come to a partition among themselves of the property, moveable and immoveable, ancestral and acquired; and according to the Bengal school, the widow is not only entitled to share an undivided estate with the brethern of her husband,† but she may require from them a partition of it. Partition may be made also while the mother survives. Nephews whose fathers are dead, are entitled, as far as the fourth in descent, to participate equally with the brethern. They take *per stipes*, and any one of the coperceners may insist on the partition of his share.

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* The law of Benares, on the other hand, prohibits any unequal distribution by the father of ancestral property of whatever description, as well as of immoveable property acquired by himelf. At a distribution of his own personal acquisitions even, he cannot reserve more than two shares for himself; and as the maxim or *factum valet* does not apply in that school, any unequal distribution of real property must be considered as not only sinful, but illigal.

† The reverse is the case, according to the law of Benares.

But in all such cases to each of the father's wives who is a mother, must be assigned a share equal to that of a son, and to the childless wives a sufficient maintenance.*

To the unmarried daughters such portions are alloted as may suffice for the *due* celebration of their nuptials.

Any improvement of joint property effected by one of the brethern does not confer on him a title to a greater share; but an acquisition made by one, by means of *his own unassisted and exclussive labour*, entitles the acquirer, according to the law of Bengal, to a double share on partition.† If the patrimonial stock was used, all the brethern share alike. If the joint stock have not been used,‡ he by whose sole labour the acquisition has been made is alone entitled to the benefit of it.

And where property has been acquired without aid from joint funds, by the exclusive industry of one member of an undivided family, others of the same family, although they were at the time living in coparcenary with him, have no right to participate in his acquisition. The rule is the same with respect to property recovered, excepting land, of which the party recovering it is entitled to a fourth more than the rest of his brethern. It has also been ruled that, if lands are acquired partly by the labor of one brother, and partly by the capital of another, each is entitled to half a share, and that, if they were acquired by the joint labor and capital of one, and by the labor only of the other, two-thirds

* But according to the *Mitakshara* and other works current in Benares and the southern provinces, childless wives are also entitled to shares, the term *mata* being interpreted to signify both mother and step-mother.

† It was accordingly ruled, that where an estate is acquired by one of four brothers living together, either with aid from joint funds, or with personal aid from the brothers, two-fifths shoud be given to the acquirer, and one-fifth to each of the other three. But according to the law as current in Benares, the fact of one brother having contributed personal labor, while no exertion was made by the other, is not a ground of distinction.

‡ What constitutes the use of joint stock is not unfrequently very difficult to determine, and no general rule can be laid down applicable to all cases that may arise. Each individual case must be decided on its own merits.

should belong to the former, and one-third to the latter; but this provision seems rather to be founded on a principle of equity, than any specific rule of Hindu law.

Presents received at nuptials, as well as the acquisitions of learning and valour, are, generally speaking, not claimable by the brethern on partition. An undivided residue is not subject to the ordinary rules of partition of joint property; in other words, if at a general partition any part of the property was left joint, the widow of a deceased brother will not participate, notwithstanding the separation, but such undivided residue will go exclusively to the brother.

Partition may be made without having recourse to writing or other formality; and in the event of its being disputed at any subsequent period, the fact may be ascertained by circumstantial evidence. It cannot always be inferred from the manner in which the brethern live, as they may reside apparently in a state of union, and yet, in matters of property, each may be separate, while on the other hand, they may reside apart, and yet may be in a state of union with respect to property.

VI.—OF THINGS IMPARTIBLE.

Although by Hindu law, as understood in all the schools, the wealth of the father becomes, at least at his death, divisible amongest all his sons; yet there are exceptions to the rule, some properties being regarded as in their nature or on the ground of long usage impartible, and others being reserved exclusively to one co-parcener by the title of exclusive acquisition. To the former class belong principalities and extensive zamindaris in the case of great families, when it is shewn that the usage has prevailed for a very long series of years, sufficient to control the general law of inheritance.*

* Wit respect to a raj as a principality, the general rule is that it is impartible. (*Baboo Gnnesh Dutt Singh* v. *Maharajah Moheshur Singh*. 6 Moore's Indian Appeals, p. 187.)

A Pooliam is a tract of country subject to a petty chieftain. It is in the nature of a raj. It may belong to an undivided family, but is not the

VII.—MARRIAGE.

Marriage among the Hindus is not only a civil contract, but a sacrament; and an unmarried man has been declared to be incapacitated for the performance of religious ceremonies.

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subject of partition. It can be held by only one member of the family at time, who is styled the Polligar, the other members of the family being entitled to a maintenance or allowance out of the estate.

The impartibility of property self-acquired by one of the members of an undivided family is so explicitly recognized by the older authorities that no doubt could ever have rested upon the doctrine so established. Even a building erected on the joint estate by one member at his own expense remains his separate acquisition, and is not divisible. "A house, garden, or the like," says the author of the Dayabhaga (chap. ii., sec. vi, verse 30,) "which one of the co-heirs has constructed within the site of the dwelling house during the father's life-time, remains his indivisible property, for his father has assented by not forbidding the construction of it."

The gains of science are also excluded from partibility. But the ordinary gains of learning or science, which have been taught at the expense of the family-fund, are subject to partition.

Places of worship and sacrifice are impartible. To divide buildings used for those purposes would be to render them utterly unsuited for the purposes and objects for which they are intended. Parties jointly entitled to the use of such buildings "can enjoy their turn of worship, unless they can agree to a joint worship, and any infringement of the right to a turn in the worship can be redressed by a suit." "We cannot," said the High Court of Bengal, "permit the object for which they were erected to be neutralized by dividing them"

Dewuttur lands also are impartible. Those for whose benefit they are dedicated can by consent from separate religious establishments, and assign to each a *palla* or turn of worship. (*Elder widow of Raja Chutter Sein* v. *Younger widow of ditto*, Select Reports, new edition Vol. i p. 239.)

With regard to effects which are not liable to partition, the author of the Mitakshara quotes the text of Yajnavalkya (Mitakshara, chap. i., sec. iv., verse 1):—Whatever else is acquired by the co-parcener himself without detriment to the father's estate, as a present from a friend, or a gift at nuptials, does not appertain to the co-heirs, nor shall he who recovers hereditary property which had been taken away give it up to the parceners, nor what has been gained by science."

Again, the ornaments and clothes worn by each person are exclusively his, but what has not been used is common and liable to partition. (Mitakshara, chap. i., sec. iv., verse 19.)

Again, what is obtained through the father's favour is exempt from partition according to a text of Yajnavalkya. "Effects which have been given by the father or by the mother belonging to him in whom they were bestowed." (Mitakshara chap. i, sec. iv,, verse 28, and sec. vi., verse 13.)

Self-acquired property is exempt from partition, provided it be acquired without detriment to, or use of, the joint estate. So also articles of personal use, and things which are in their nature indivisible, such as a common road are exempted.

Jimutavahana treats in the sixth chapter of the Dayabhaga upon the subject of impartibility, and enumerates the following as exempt from partition: (1) The gains of science obtained from displaying and making known one's own knowledge; (2) gains of valour; (3) wealth received

There are eight forms of marriage: the *Brahma*, *Daiva*, *Arsha*, *Prajapatya*, *Asura*, *Gandharva*, *Rakshaka*, and *Paisacha*.*

The relations with whom it is prohibited to contract matrimony are thus enumerated by *Menu*:—"She who is not descended from his *paternal* or *maternal* ancestors within the sixth degree, and who is not known by her family name to be of the same primitive stock with his father and mother, is eligible by a twice-born man for nuptials and holy union."

Adultery is a criminal, as well as a civil, offence, and an action for damages as preferred by the husband seems to lie against the adulterer.

In all cases, and for whatever cause (except adultery), a wife may have been deserted, she is entitled to sufficient maintenance. †

Coverture incapacitates a woman from all contracts,‡ with certain exceptions.

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on account of marriage at the time of accepting a bride; (4) items of property required for personal use. Again, "a house, garden, or the like, which one of the co-heirs had constructed within the site of the dwelling-place during his father's life-time, remains his indivisible property, for his father has assented by not forbidding the construction of it."

* The first four forms are peculiar to the Brahminical tribe; the fifth to Vaisyas and Sudras: the sixth and seventh to the *Kshatrya*; and the last is reprobated for all. In the *Brahma* nuptials, the damsel is given (by the father) when he has decked her as elegantly as he can, to the bridegroom, whom he has invited; in the *Daiva*, to the priest employed in performing the sacrifice; in the *Arsha*, to the bridegroom, from whom he receives (for religious purposes) a bull and a cow. When the father gives her to a suitor, saying 'perform all duties together,' the marriage is named *Prajapata* or *Kaya*, and a son produced by it confers purity on himself and on six descendents in the male line: an *Asura* marriage is contracted by receiving property from the bridegroom; a *Gandharva* by reciprocal amorous agreement; a *Rakshasa*, by seizure in war; a *Paischaha*, by deceiving the damsel.

† In the event of a man forsaking his wife without just cause, and marrying another, he shall pay his first wife a sum equal to the expenses of his second marriage, provided she have not received any *stridhan*, or make it up to her, if she have; but he is not required in any case to assign more than a third of his property.

Among the many faults for which a wife be lawfully deserted, the chief are, barrenness, insanity, adultery, waste of her husband's property, drunkenness, an incurable and grievous malady (as leprosy and the like), and degradation from caste.

‡ But those contracts are valid and binding, which are made by wives, the livelihood of whose husbands chiefly depends upon their labour; so also are those made for the support of the family during the absence or disability, mental or corporeal, of the husband. But the correct opinion seems to be that, except in cases where, by the Hindu as by the English law, she may be reasonably taken to have contracted merely as the agent or servant of her husband, she is fully capable of entering into any lawful contract, whether she has separate property or not.

VIII.—ADOPTION.*

In the present age, two, or at the most three, froms of adoption only are allowed: the *Duttaka* or son given, the *Kritima* † or son made, and the *Dwyamushayana* or son of both fathers. The *Duttaka* and the *Kritrima* ‡ are the most common.

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* A son of any description should be anxiously adopted by one who has no male issue, for the funeral cake, water, and solemn rites, and for the celebrity of his name. The following texts of *Menu* contain some of the requisite conditions for the adoption of a son:—

"He whom his father, or mother with her husband's assent, gives to another as his son, provided that the donee have no issue, if the boy be of the same class, and affectionately disposed, is considered as a son given, the *gift being confirmed by pouring water.*" "He is considered as a son made or *adopted*, whom a man takes as his own son, the boy being equal in class, endued with filial virtues, acquainted with the merit of *performing obsequies to his adopter*, and with the sin of omitting them."

† The *Kritima* form of adoption.—It prevails only in Mithila. This form requires no ceremony to complete it, and is instantaneously perfected by the offer of the adopting, and the consent of the adopted, perty. There is no restriction except as to tribe, it being requisite that the tribe of the adopting father and the adopted son be the same. There is no limit as to age, and no condition as to the performance of ceremenies, so much so that it has been said that a man may adopt his own brother, or even his own father. But he, as well as his issue, continues after the adoption to be considered a member of his natural family, and he takes the inheritance both his own family and that of his adopting father. Another peculiarity of this species of adoption is, that a person adopted in this from by the widow does not thereby become the adopted son of the husband, even though the adoption should have been permitted by the husband; and the express consent of the person nominated for the adoption must be obtained during the life-time of the adopting party. This relation of *Kritrima* son extends, as has already been observed, to the contracting parties only; and the son so adopted will not be considered the grandson of the adopting father's father, nor will the son of the adopted be considered the grandson of his adopting father.

‡ The *Dwyamushayana*,—In this peculiar species of adoption, the adopted son still continues a member of his own family, and partakes of the estate both of his natural and adopting father, and, so inheriting, is liable for the debts of each. To this form of adoption the prohibition as to the gift of an only son does not apply. It may take place either by special agreement that the boy shall continue son of both fathers, when the son adopted is termed *Nitya Dwyamushayana*; or otherwise, when the ceremony of tonsure may have been performed in his natural family when he is designated *Anitya Dwyamushayana*: and in this latter case, the connection between the adopting and the adopted parties endures only during the life-time of the adopted. His children revert to their natural family. With a legitimate son subsequently born, the *Dwyamushayana* takes half a share of his adopting father's property.

It is an universal rule in Bengal and Benares, that a woman can neither adopt a son, nor give away her son in adoption, without the sanction of her husband previously obtained.* The competency of a widow to adopt a son, with the sanction of her husband expressed before his decease, is fully established.† It has been ruled that in the case of an adoption made by a widow without having obtained the consent of her husband (or in which the adopted son shall not have been delivered over to her by either of his parents, but only his brother) the adoption is invalid. It is required that the party adopting should be destitute of a son and son's son, and son's grandson; that the party adopted should neither be the only nor the eldest son, nor an elder relation, such as the paternal or maternal uncle; that he should be of the same tribe as the adopting party; that he should not be the son of one whom the adopter could not have married, such as his sister's son or daughter's son.‡ It is lastly requisite that the adopted son should be initiated in the name of the family of the adopting party, with the *prescribed form* and *solemnities*.§

* But it does not appear that the prohibition in Mithila, which prevail, against her receiving a son in adoption according to the *Dattaka* forms even with the previous sanction of her husband, he being dead, extends to her receiving a boy in adoption according to the *kritrima* form: and the son so adopted will perform her obsequies, and succeed to her peculiar property, though not to that of her deceased husband It is not uncommon in the province of Mithila for the husband to adopt one *Kritrima* son, and the wife another.

† According to the law of the western provinces, a woman can adopt a son, with the sanction of her husband's kinderd, after his death.

‡ This last rule, however, applies only to the three superior classes, and does not extend to Sudras.

§ The adoption being once completed, the son adopted loses all claim to the property of his natural family, but he is estranged from his own family only partially; for the purposes of marriage, mourning, &c., he is not considered in the light of a stranger, and the prohibited degrees continue in full force as if he had never been removed. His own family have no claim whatever to any property to which he may have succeeded. He becomes (with the exception above noticed) to all intents and purposes a member of the family of his adopting father.

If a man has a son, and the son of an elder son deceased he may give the former away in adoption. Two persons cannot join in the adoption of one son. A notion seems to have prevailed, that two brothers might adopt the same individual; but this is entirely erroneous. It is clear that a man having adopted a boy, and that boy being alive he cannot adopt another It seems to be admitted that a man having a legitimate son may not only authorize his wife to adopt a son after his death, failing such legitimate son, but also, failing the son so adopted, to adopt another in his stead; and it has also been ruled that authority to a wife to adopt in the event of a disagreement between her and a son of the husband, then living, will not avail; though authority to adopt, in the event of that son's death, would be valid.*

The adopted son succeeds to his adopting father's property *collaterally as well as lineally*, and excepting the case of *Dwyamushayana*, is excluded from participating in his natural father's property. He has also no legal claim to the property of a *Bandhu* or cognate relation, *e. g.*, an adopted son cannot inherit the property of his adopting mother's father.

A boy adopted by a widow with the permission of her late husband has all the right of a posthumous son, so that a sale made by her to his prejudice of her late husband's property, even before the adoption, will not be valid, unless made under circumstances of inevitable necessity.

The question as to the proper age for adoption has been much discussed; and the most correct opinion seems to be that there is no defined and universally applicable rule as to

* In the case of a Hindu of Bengal dying in his farther's life-time without issue, but leaving a widow authorized to adopt a son, if such adoption be made by the widow, with the knowledge and consent of her deceased husband's father, at any time before he shall have made any other legal disposition of the property, or a son shall have born to his daughter in wedlock, no such subsequent disposition or birth shall invalidate the claim of the son so adopted to the inheritance.

the age beyond which adoption cannot take place, so long as the initiatory ceremony of tonsure according to one opinion, and of investiture according to another, has not been performed in the family of the natural father.

According to the *Dattaka Mimansa* the period fixed beyond which adoption cannot take place is the age of five years.

In the *Dattaka Chandrica* the period fixed for adoption is extended, with respect to the three superior tribes, to their investiture with the characteristic chords, which ceremony is termed *Upanyana*, and is subsequent to that of tonsure or *Churakarana*; and with respect to Sudras, to their contracting marriage. But investiture in the one case, and marriage in the other, must be performed in the family of the adopting father. It should be observed, however, that where the ceremony of *Upanyana* has once been performed, an insurmountable bar to adoption is thereby immediately created.

Although it may be asserted that, generally speaking, there are only three forms of adoption allowable in the present age, yet the rule should be qualified by admitting an exception in favour of any particular usage which may be proved to have had immemorial existence. Thus, it appears that the *Goswamis*, and other devotees who lead life of celibacy, buy children to adopt them in the form termed *Krita*, or son bought; and that the practice of appointing brothers to raise up male issue to deceased, impotent, or even absent husbands, still prevails in Orissa. The son so produced is termed *Kshetraja*, or son of the wife; and doubtless these several sorts of subsidiary sons should be held entitled to the patrimony of their adopting fathers in places where the *lex loci* would justify the affiliation.

IX.—MINORITY.

Minors* are, under the protection of the law, favoured in all things which are for their benefit, and not prejudiced by anything to their disadvantage.

A question arose whether the debts of a father become payable out of his assets, even in the hands of his heir (who is a minor), on demand from the guardian; and it was determined that, according to the invariable practice of the Courts, no plea of minority could be listened to, or any other doctrine recognized than that the estate of a Hindu of Bengal becomes liable at his death for his just debts, especially where he has pledged his land as security for those debts, and that this power of selling outright or conditionally any part of or all his landed property could not be questioned.

* A father is recognized as the legal guardian of his children, where he exists; and where the father is dead, the mother may assume the guardianship: but where the duties of manager and guardian are united, she is, in the exercise of the former capacity, necessarily subject to the control of her husband's relations: and with respect to the minor's person likewise, there are some acts to which she is incompetent, such as the performance of the several initiatory rites, the management of which rests with the paternal kindred. In default of her, an elder brother of a minor is competent to assume the guardianship of him. In default of such brother, the paternal relations generally are entitled to hold the office of guardian; and, failing such relatives, the office devolves on the maternal kinsmen, according to their degree of proximity; but the appointment of guardians universally rests with the ruling power.

The guardianship of a female (whether she be a minor or an adult), until she be disposed of in marriage, rests with her father: if he be dead, with her nearest paternal relations. After her marriage, a woman is subjected to the control of her husband's family. In the first instance, her husband is her guardian: in default of him, her sons, grandsons, and great-grandsons, are competent to assume the guardianship; and in default of them, her husband's heirs generally, or those who are entitled to inherit his estate after her death, are competent to exercise the duties of guardian over herself and her property. On failure of her husband's heirs, her paternal relations are her guardians; and, failing them, her maternal kindred. In point of fact, females are kept in a continual state of pupilage.

X.—WIDOW'S RIGHTS AND POWERS.

A widow inheriting her husband's property has not an absolute proprietary right, but she is only a holder in trust for certain uses, and, should she make waste, they who have the reversionary interest have clearly a right to restrain her from doing so. But she is allowed to alienate by sale any part or the whole of her husband's property as may be necessary for the payment of his debts,[1] for her own subsistence,[2] for the support of her husband's family,[3] for the performance of exequial rites,[4] for the benefit of his soul, and[5] for the payment of the Government revenue, with or without the consent of her kinsmen or next heirs. In all other instances the consent of her husband's next heir is absolutely necessary. Those of the nearest relations of the husband are alone entitled to inherit who survive the widow, and not the heirs of those who lived at the time of her husband's death, but died during the widow's life time. If a widow, having succeeded her husband, should dispose of his property by gift or other alienation with the sanction of her husband's next heir, and the heir consenting die before the widow, then the heir who succeeds in default of the consenting party, on the widow's death, cannot question the validity of such an alienation; for the rule is, if any alienation of a widow's inherited property take place with the consent of the then living heir, its validity cannot be questioned hereafter even by the contingent next heir.

XI.—MAINTENANCE.

The persons entitled to maintenance are:—(1) The members of the undivided family, their wives and children, (2) persons who from some mental or bodily defect are unable to inheirt, (3) illegitimate sons, when not entitled as heirs, (4) persons taken in adoption, whose adoption has proved invalid, or who have been deprived of their full rights by the subsequent birth of a legitimate son, (5) concubines when analogous to female slaves who in former times were recognized as members of a man's family, (6) widows, (7) wives, (8) parents including the step-mother, and mother-in-law, (9) sister or step-sister until her marriage, or if her husband's family be unable to support her, and (10) minor children,—(see *Mayne*, s, 374).

As to how the widow's maintenance is to be provided for, *Strange** says, "It may be supplied by an assignment of land or an allowance of money; in either case proportioned to her support, and that of those dependent upon her, includng the performance of charities and the discharge of religious obligations; and this always, with a reference to the amount of the property, so as, at the utmost, (as has been said,) not to exceed a son's, or other parcener's share. In whatever way the provision is made, care should be taken to have it secured. The manner of doing this is discretionary, there being no special law, directory herein. Whether, in estimating her *Stridhana* on the occasion, her clothes, ornaments, and the like, are to be taken into account or only such articles of her property as are productive of income to her, or conducive to her subsistance, does not distinctly appear; though the restricting the account to the latter would seem to be reasonable, considering the object. An opinion, that her maintenance should be independent of her peculiar property, is unsupported."

* p. 171, fourth edn.

Macnaghten's

PRINCIPLES OF HINDU LAW.

CHAPTER I.

OF PROPRIETARY RIGHT.

Property is fourfold.

PROPERTY, according to the Hindu law, is of four descriptions, real, personal, ancestral, and acquired. I use the terms real and personal in preference to the terms moveable and immoveable, because, although the latter words would furnish a more strict translation of the expressions in the original, yet the Hindu law classes, amongst things immoveable, property which is of an opposite nature, such as slaves and corrodies, or assignments on land.* In a work of this kind, intended solely for the purpose of practical utility, it would be useless to attempt any inquiry as to the origin of the right of property according to the notions of the Hindus, or as to the nature of the tenures of real property in India. The various modes of acquisition, as occupancy, birth, gift, purchase, and the like, have been detailed and commented on with all the elaborate minuteness peculiar to the Hindu jurists.† It seems sufficient here to inquire into the nature of that property which is created by birth, for to this source must be traced all the impediments which exist to alienation;

* *Jim. Va.* cited in Dig., vol iii., page 84.

† Is property included in the seven categories, substance and the rest or is it distinct therefrom? *Jagannatha* in the Digest, vol. ii., page 506: and ownership, in his opinion, following the *Nyaya* doctrine, "is a relation between cause and effect, attached to the owner who is predicated, of particular substance and subsisting in the substance by connection with the predicable."

a man without heirs having an absolute and uncontrolled dominion over his property, by whatever means acquired. That an indefeasible, inchoate right is created by birth, seems to be universally admitted, though much argumentative discussion has been used to establish that this alone is not sufficient to create proprietary right. The most approved conclusion appears to be, that the inchoate right arising from birth, and the relinquishment by the occupant (whether effected by death or otherwise), conjointly create this right; the inchoate right which previously existed becoming perfected by the removal of the obstacle,* that is, by the death of the owner (natural or civil), or his voluntary abandonment.† In ancestral real property, the right is always limited; and the sons, grandsons, and great grandsons of the occupant, supposing them to be free from those defects, mental or corporeal, which are held to defeat the right of inheritance,‡ are declared to possess an interest in such property equal to that of the occupant himself; so much so, that he is not at liberty to alienate it, except under special and urgent circumstances, or to assign a larger share of it to one of his

Right of inheritance how created

* *Sricrishna*, cited in the Digest, vol. ii., page 517.

† The fact of the ancestor being missing for a period exceeding twelve years constitutes a legal title to succession on the part of the heirs. This doctrine was recognized in a case decided by the Sudder Dewanny Adawlut on the 25th of April 1820 (Reports, vo. iii., page 28), wherein it was determined that twelve years should be allowed for the re-appearance of a missing person, after which his death will be presumed; but some authorities maintain that the period varies with reference to the age of the missing person. See note to Case 7, vol. ii., page 9.

‡ Various diseases and various offences have been declared by the Hindu legislators to be of such a nature as to disqualify for inheritance. It is problematical how far our courts would go in support of objections which must in some instances be deemed irrational prejudices. The only reported case in which the question has been agitated, may be found in the Bengal Reports, pages 108 and 257, vol. ii.; and in the Bombay Reports, page 411, vol. i., there is a case reported, in which a widow's claim to her husband's estate was disallowed on account of her blindness. For an enumeration of the disqualifying causes, see Digest of Hindu Law, page 298, vol. iii., and Elem. Hin. Law. App., page 335 *et seq.*, and the chap. vol. ii., treating of Exclusion from Inheritance, to the note in which an enumeration of the several disqualifying circumstances has been given.

descendants than to another.* With respect to personal property of every description, whether ancestral or acquired, and with respect to real property acquired or recovered by the occupant, he is at liberty to make any alienation or distribution which he may think fit, subject only to spiritual responsibility.† The property of the father being thus restricted in respect of ancestral real property, and wills and testaments being wholly unknown to the Hindu law, it follows, for the sake of consistency, that they must be wholly inoperative, and that their provisions must be set aside, where they are at variance with the law; otherwise, a person would be competent to make a disposition to take effect after his death, to which he could not have given effect during his lifetime.‡ A will is nothing more or less than "the legal declaration of a man's intentions, which he wills to be performed after his death;" but willing to do that which the law has prohibited cannot be held to be a *legal* declaration of a man's intentions. There may be a gift in contemplation of death, but a will, in the sense in which it is understood in the English law, is wholly unknown to the Hindu system; and such gift can only be held valid under the same circumstances as those under which an ordinary gift would be considered valid. What may not be done *inter vivos* may not be done by will. Of this description is the unequal distribution of ancestral real property. There are certain acts prohibited by the law,

Restrictions on alienation.

Of wills.

* *Jagannatha* in Dig., vol. iii., page 45.

† *Vrihaspati*, Dig., vol. iii., page 32.

‡ For a more full discussion of the right of a Hindu to make a will, see considerations on Hindu Law, p. 320, wherein the opinion of Mr. Colebrooke is introduced, to which the doctrine here laid down is conformable. See also the case of Huree Bullubh Gungaram *v.* Koshoram Sheodas, Bombay Reports, vol. ii., page 6, in which the plea of a will in opposition to the claims of heirs was treated as inadmissible and repugnant to the Hindu law, and the case of Sobharam Sumbhoodas *v.* Purmanund Bharechund, ibid,. page 471; also the case of Musst. Goolaub *v.* Musst. Phool. vol. i, page 154; and that of Gungaram Viswunath *v.* Tappeo Bace, ibid., page 372, and of Tooljaram Hurjeevun *v.* Hurbheram and another, ibid., 380; also App. Elem. Hin. Law, p. 9 *et passim*, and p. 405 *et seq.*

which, however, if carried into effect, cannot, according to the law of Bengal, be set aside, and which, though immoral, and (in one sense of the word) illegal, cannot be held to be invalid. For instance, a father, though declared to have absolute power over property acquired by himself, is prohibited from making an unequal distribution of such property among his sons by preferring one or excluding another without sufficient cause. This has been declared in the *Dáyabhága* to be a precept, not a positive law; and it is therein laid down that a gift or transfer under such circumstances is not null; "for a fact cannot be altered by a hundred texts." There is nothing inconsistent in this, as the doctrine is rather confirmatory of the texts which declare the absolute nature of the father's power over such property; but it has been held to extend to the legalizing of an unequal distribution of ancestral real property, and thereby interpreted in direct opposition to a positive law, which declares the ownership of the father and the son to be equal with respect to this description of property. But it cannot legitimately bear such a construction. It cannot be held to nullify an existing law, though it may be construed as declaring a precept inoperative with reference to the power expressly conferred by the law, or, in other words, to signify that an act may be legally right, though morally objectionable. Thus, a coparcener is prohibited from disposing of his own share of joint ancestral property; and such an act, where the doctrine of the *Mitácsharà* prevails (which does not recognize any several right until after partition, or the principle of *factum valet*), would undoubtedly be both illegal and invalid. But, according to the *Dáyabhága*, which recognizes this principle, and also a several though unascertained right in each coparcener, even before partition, a sale or other transfer under such circumstances would be valid and binding, as far as concerned the share of the transferring party. In the case of Bhowaneepershad Goh *versus* Musst. Taramunee, it

Doctrine of "*factum valet*" noticed.

To what cases applicable.

was determined by the Sudder Dewanny Adawlut that, according to the Hindu law as current in Bengal, a coparcener may dispose of, by gift or otherwise, his own undivided share of the ancestral landed property, notwithstanding he may have a daughter and a daughter's son living;* while in the case of Nundram and others it was determined that, according to the law as current in Behar, a gift of joint undivided property, whether real or personal, is not valid, even to the extent of the donor's own share.† I am aware that cases have been decided in opposition to the doctrine for which I here contend. These I propose briefly to notice. The first on record is that of Rushiklal Dutt and Hurnaul Dutt, executors of the will of Mudunmohun Dutt *versus* Cheytunchurn Dutt, cited by Sir Thomas Strange, in his Elements of Hindu law.‡ He states, that the case was decided about the year 1789; that the testator, a Hindu, the father of four sons, and possessed of property of both descriptions, ancestral and self-acquired, having provided for his eldest by appointment, and advanced to the three younger ones in his life the means of their establishment, thought proper to leave the whole of what he possessed to the two younger ones, to the disherison of the two elder, of whom the second disputed the will; that on reference to the pundits of the court, they affirmed the validity of the will, their answers being short; and that Sir W. Jones and Sir Robert Chambers concurred in this determination. The author of the Elements adds: "The ground with the Pundits probably was (the Bengal maxim), that, however inconsistent the act with the ordinary rules of inhe-

Cases cited involving the doctrine of wills and unequal distributions.

* Sudder Dewanny Adawlut Reports, vol. iii., page 138. The same doctrine was held in the case of Ramkunhai Rai and others *v.* Bungchund Bunhoojea, ibid. 17, and the subject is more fully discussed by Mr. Colebrooke in a note to vol. i., pp. 47 and 117.

† Case of Nundram and others *v.* Kashee Pande and others, Sudder Dewanny Adawlut Reports, vol. iii., page 232. The same doctrine was held in the case of Ooman Dutt *v.* Kunhia Singh, ibid. 144.

‡ Page 262.

ritance and the legal pretensions of the parties, *being done*, its validity was unquestionable." To this it can only be answered that the motives which actuated the Pundits in their exposition of the law, and the judges in their decision, are avowedly stated on conjecture only; and that, if such motives are allowed to operate, there must be an end to all law, the maxim of *factum valet* superseding every doctrine, and legalizing every act. The particulars of the case not having been stated, it cannot with safety be relied on as a precedent.

The second case is that of Eshanchund Rai *versus* Eshorchund Rai, decided in the Sudder Dewanny Adawlut on the 23rd of February 1792.* In that case it was held that a gift, in the nature of a will, made by the *zemindar* of Nuddea, settling the whole of his *zemindaree* on the eldest of his four sons, subject to a pecuniary provision for the younger ones, was good. The Pundits are stated to have assigned six reasons for this opinion, not one of which, except the last, appears entitled to any weight. The last reason assigned, namely, that a principality may lawfully and properly be given to an eldest son, is doubtless correct, and, taking a *zemindaree* in the light of a principality, is applicable, and would alone have sufficed to realize the transaction. A principality has, indeed, been enumerated among things impartible. But, with respect to the other reason assigned, they may be briefly replied to as follows. To the first, that, "according to law, a present made by a father to his son through affection, shall not be shared by the brethren," it may be objected that this relates to property other than ancestral, over which the father is expressly declared to have control. To the second, "that what has been acquired by any of the enumerated lawful means, among which inheritance is one, is a fit subject of gift," that this supposes an acquisition in

*Sudder Dewanny Adawlut Reports, vol. i., page 2.

which no other person is entitled to participate, and not the case of an ancestral estate, in which the right of the father and son has been declared equal. To the third, "that a co-heir may dispose of his own share of undivided property," that his right to do so is admitted; but this does not include his right to alienate the shares of others. To the fourth, "that although a father be forbidden to give away lands, yet if he nevertheless do so, he merely sins, and the gift holds good," that the precept extends only to property over which the father has absolute authority, and cannot affect the law, which expressly declares him to have no greater interest than his son in the ancestral estate. And to the fifth, "that *Raghunandana* in the *Dàyatatwa*, restricting a father from giving lands to one of his sons, but clothes and ornaments only, is at variance with *Jimutavahana*, whose doctrine he espouses, and who only says that a father acts blameably in so doing," that no such variance in reality exists. In addition to the above, it may be stated, that the suit in question was brought by an uncle against his nephew to recover a portion of an estate which had previously devolved entire on the brother of the claimant, and which, it appeared, had never been divided.*

The third case is that of Ramkoomar Neaee Bachesputee *versus* Kishenkinker Turk Bhoosun, decided by the Sudder Dewanny Adawlut on the 24th of November 1812.† In that case it was maintained that the gift by a father of the whole ancestral estate to one son, to the prejudice of the rest, or even to a stranger, is a valid act (although an immoral one), according to the doctrine received in Bengal. To refute the opinion declared by the Pundits on that occasion, it is merely necessary to state the authorities quoted by them, which would have been more applicable to the maintenance

* See Appendix Elem. Hin. Law, page 437.
† Sudder Dewanny Adawlut Reports, vol. ii., page 42.

of the opposite doctrine. The following were the authorities cited in support of the above opinion: 1st. The text of *Vishnu* cited in the *Dáyabhága*; "When a father separates his sons from himself, his will regulates the division of his own acquired wealth." 2d. A quotation also from the *Dáyabhága*: "The father has ownership in gems, pearls, and other moveables, though inherited from the grandfather, and not recovered by him, just as in his own acquisitions, and has power to distribute them unequally; as *Yájnyawalcya* intimates: 'The father is master of the gems, pearls and corals, and of all (other moveable property); but neither the father nor the grandfather is so of the whole immoveable estate.' Since the grandfather is here mentioned, the text must relate to his effects. By again saying, "all" after specifying 'gems, pearls, &c'., it is shown that the father has authority to make a gift or any similar disposition of all effects, other than land &c., but not of immoveables, a corrody, and chattels (i.e. slaves); since here also it is said 'the whole,' this prohibition forbids the gift or other alienation of the whole, because immoveable and similar possessions are means of supporting the family. For the maintenance of the family is an indispensable obligation, as *Menu* positively declares: 'The support of persons who should be maintained is the approved means of attaining heaven; but hell is the man's portion if they suffer.' Therefore (let a master of a family) carefully maintain them. The prohibition is not against a donation or other transfer of a small part, not incompatible with the support of the family: for the insertion of the word 'whole' would be unmeaning (if the gift even a small part were forbidden). The text of *Yájnyawalcya* cited in the *Prayushchitta-vivek:* "From the non-performance of acts which are enjoined, from the commission of acts which are declared to be criminal, and from not exercising a control over the passions, a man incurs punishment in the next world." An examination of the

authorities above quoted, as given by the law-officers in the case in question, will make it evident that they are totally insufficient for the support of the doctrine to which they were intended to apply.

The fourth case is that of Sham Singh *versus* Musst. Umraotee, decided in the Sudder Dewanny Adawlut on the 28th of July 1813,* on which occasion it was determined that, by the Hindu law as current in Mithilá, a father cannot give away the whole ancestral property to one son to the exclusion of his other sons. The author of the "Considerations on Hindu law," commenting on this decision, infers that the Sudder Dewanny Adawlut would not have entertained any doubt as to the validity of the gift, had it depended upon the law as current in Bengal; but there seems to be no other ground for this inference than the erroneous doctrines laid down in the two previously cited cases, together with the fact of the parties having disputed as to which law should govern the decision.

The fifth case is that of Bhowannychurn Bunhoojea *versus* the Heirs of Ramkaunt Bunhoojea, which was decided in the Sudder Dewanny Adawlut on the 27th of December 1816,† and in which case it was ruled, that an unequal distribution made by a father among his sons of ancestral immoveable property is illegal and invalid, as is also the unequal distribution of property acquired by the father, and of moveable ancestral property, if made under the influence of a motive which is held in law to deprive a person of the power to make a distribution. The question as to the father's power was thoroughly investigated on this occasion. There being a difference of opinion between the Pundits attached to the Sudder Dewanny Adawlut, the following question was proposed to the Pundits of the Supreme Court, Tarapershad and

* Sudder Dewanny Adawlut Reports, vol. ii., page 74.
† Ibid, page. 202.

Mrityoonjyee, to Nurahurree, Pundit of the Calcutta Provincial Court, and Ramajya, a Pundit attached to the College of Fort William: "A person whose elder son is alive, makes a gift to his younger, of all his property, moveable and immoveable, ancestral and acquired. Is such a gift valid according to the law-authorities current in Bengal, or not? and if it be invalid, is it to be set aside?"

The following answer, under the signatures of the four Pundits above mentioned, was received to this reference:—"If a father, whose elder son is alive, make a gift to his younger of all his acquired property, moveable and immoveable, and of all the ancestral moveable property, the gift is valid, but the donor acts sinfully. If, during the lifetime of an elder son, he make a gift to his younger, of all the ancestral immoveable property, such gift is not valid. Hence, if it have been made, it must be set aside. The learned have agreed that it must be set aside, because such a gift is *á fortiori* invalid; inasmuch as he (the father) cannot even make an unequal distribution among his sons of ancestral immoveable property; as he is not master of all; as he is required by law, even against his own will, to make a distribution among his sons of ancestral property not acquired by himself (*i.e.* not recovered); as he is incompetent to distribute such property among his sons until the mother's courses have ceased, lest a son subsequently born should be deprived of his share; and as, while he has children living, he has no authority over the ancestral property.

"Authorities in support of the above opinions.

1st. *Vishnu*, cited in the *Dáyabhága*:—"His will regulates the division of his own acquired wealth." 2d. *Yájnyawalcya*, cited in the *Dáyabhága*:—"The father is master of the gems, corals, pearls, and of all other moveable property." 3d. *Dáyabhága*:—"The father has ownership in gems, pearls, and other moveables, though inherited from the

grandfather, and not recovered by him, just as in his own acquisitions." 4th. *Dáyabhága*:—"But not so, if it were immoveable property inherited from the grandfather, because they have an equal right to it. The father has not in such case an unlimited discretion." Unlimited discretion is interpreted by *Sricrishna Tarcalancara* to signify a competency of disposal at pleasure. 5th. *Dáyabhága*:—"Since the circumstance of the father being lord of all the wealth is stated as a reason, and that cannot be in regard to the grandfather's estate, an unequal distribution made by the father lawful only in the instance of his own acquired wealth." Commentary of *Sricrishna* on the above texts:—"Although the father be in truth lord of all the wealth inherited from ancestors, still the right here meant is not merely ownership, but competency for disposing of the wealth at pleasure; and the father has not such full dominion over property ancestral." 6th. *Dáyabhága*:—"If the father recover paternal wealth seized by strangers, and not recovered by other sharers, nor by his own father, he shall not, unless willing, share it with his sons; for in fact it was acquired by him." In this passage, *Menu* and *Vishnu* declaring that "he shall not, unless willing, share it, because it was acquired by himself," seem thereby to intimate a partition amongst sons, even against the father's will, in the case of hereditary wealth not acquired (that is, recovered) by him. 7th. *Dáyabhága*:—"When the mother is past child-bearing," regards wealth inherited from the paternal grandfather. Since other children cannot be borne by her when her courses have ceased, partition among sons may then take place; still, however, by the choice of the father. But if the hereditary estate were divided while she continued to be capable of bearing children, those born subsequently would be deprived of subsistence; neither would that be right; for a text expresses: "They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require the means of support; and dis-

sipation of their hereditary maintenance is ensured." *Sricrishna* has interpreted "the dissipation of hereditary maintenance" to signify the being deprived of a share in the ancestral wealth. 8th. *Dwaitanirnaya*:—"If there be offspring, the parents have no authority over the ancestral wealth; and from the declaration of their having no authority, any unauthorized act committed by them is invalid." 9th. Text of *Vijnyaneshwara*, cited in the *Medhatithi*:—"Let the judge declare void a sale without ownership, and a gift or pledge unauthorized by the owner." The term "without ownership," intends incompetency of disposal at pleasure. 10th. Text of *Nareda*:—"That act which is done by an infant, or by any person not possessing authority, must be considered as not done. The learned in the law have so declared."

I have given the above opinion, together with the authorities cited in its support, at full length, from its being apparently the most satisfactory doctrine hitherto recorded on the subject. By declaring void any illegal alienation of the ancestral real property, it preserves the law from the imputation of being a dead letter, and protects the son from being deprived by the caprice of the father, of that in which the law has repeatedly and expressly declared them both to have equal ownership. The case of Ramkaunt is the latest reported decision by the Sudder Dewanny Adawlut connected with the point in question. Various cases have been cited by the author of the "Considerations,"* in which wills made by Hindus have been upheld by the Supreme Court, though at variance with the doctrine above laid down. The will of Rajah Nobkishen, who, although he had a begotten and an adopted son, left an ancestral *talook* to the sons of his brother, is perhaps the most remarkable of the cases cited; but in this, as well as in most of the others, the point of law was never touched upon the parties hav-

* See the chapter on Wills, page, 316 *et passim*.

ing joined issue on questions of fact. Upon the whole, I conclude that the text of the *Dáyabhága*, which is the groundwork of all the doubts and perplexity that have been raised on this question, can merely be held to confer a legal power of alienating property, where such power is not expressly taken away by some other text. Thus, in Bengal, a man may make an unequal distribution among his sons of his personally acquired property, or of the ancestral moveable property; because, though it has been enjoined* to a father not to distinguish one son at a partition made in his lifetime, nor on any account to exclude one from participation without sufficient cause, yet, as it has been declared in another place that the father is master of all moveable property, and of his own acquisitions,† the maxim that a fact cannot be altered by an hundred texts here applies to legalize a disregard of the injunction, there being texts declaratory of unlimited discretion, of equal authority with those which condemn the practice. In other parts of India, where the maxim in question does not obtain, the injunction applies in its full force, and any prohibited alienation would be considered illegal.‡ The subject will be resumed in the chapter treating of Partition.

Ancestral real property cannot be alienated at pleasure.

* *Catyáyana*, cited in Dig., vol. ii., page 540.
† *Yájnyavalcya*, ibid. page 159.
‡ Elements of Hindu Law, vol. i., page 123, and Appendix, chap. 1st; and see Bombay Reports, pages 154, 372, and 380, vol. i., and pages 6 and 471, vol. ii.

CHAPTER II.

OF INHERITANCE.

Of sons.

According to the Hindu law of inheritance, as it at present exists, all legitimate sons, living in a state of union with their father at the time of his death, succeed equally to his property, real and personal, ancestral and acquired. In former times the right of primogeniture prevailed to a certain extent; but that, with other usages, has been abrogated in the present or *Cali* age.* The right of representation is also admitted, as far as the great-grandson; and the grandson and great-grandson, the father of the one and the father and grandfather of the other being dead will take equal shares with their uncle and grand-uncle respectively. Indeed, the term *putra* or son has been held to signify, in its strict acceptation, a grandson and great-grandson. An adopted

* See the case of Taliwur Singh *versus* Puhlwan Singh, Suddor Dowânny Adawlut Reports, vol. iii. page 203, wherein a claim of primogeniture being preferred, it was determined that priority of birth does not entitle to a larger portion. There is another decision on record (vol. ii., p. 116) of a case in which there were sons by different wives, and one party claimed that the estate should be distributed according to the number of wives, without reference to the number of sons borne by each (a distribution technically termed *putnibhaga*), averring that such had been the *koolachar*, or immemorial usage of the family; but the Court determined that the distribution among them should be made, not with reference to the mothers, but with reference to the number of sons: being of opinion, that although, in cases of inheritance, *koolachar*, or family usage, has the prescriptive force of law, yet, to establish *koolachar*, it is necessary that the usage have been ancient and invariable. See also the case of Bhyroochund Rai *versus* Russoomunee. vol. i., page 27, and the case of Sheo Buksh Sing *versus* the Heirs of Futteh Sing. vol. ii., page 265. See also Elem. Hin. Law, App., page 288. In the succession to principalities large landed possessions, long established *koolachar* will have the effect of law, and convey the property to one son to the exclusion of the rest. It has been stated by Mr. Colebrooke, in a note to the Digest (vol. ii., page 119), that the great possessions called *zemindarees* in official language, are considered by modern Hindu lawyers as tributary principalities.

son is a substitute for a son of the body, where none such exists and is entitled to the same rights and privileges. Among the sons of the *Sudra* tribe, an illegitimate son by a slave girl takes with his legitimate brothers a half share; and where there are no sons (including sons' sons and grandsons), but only the son of a daughter, he is considered as a coheir, and takes an equal share.*

Of sons' sons.

In default of sons, the grandsons inherit, in which case they take *per stirpes*, the sons, however numerous, of one son, taking no more than the sons, however few, of another son.

Of sons' grandsons.

In default of sons and grandsons, the great-grandsons inherit; in which case they also take *per stirpes*, the sons, however numerous, of one grandson, taking no more than the sons, however few, of another grandson. They will take the shares to which their respective fathers would have been entitled, had they survived.

Of the widow.

In default of sons, grandsons, and great-grandsons in the male line, the inheritance descends lineally no farther, and the widow inherits, according to the law as current in Bengal, whether her late husband was separated, or was living as a member of an undivided family; but, according to other schools, the widow succeeds to the inheritance in the former case only, an undivided brother being held to be the next heir. If there be more than one widow, their rights are equal.† Much discussion has arisen respecting the nature of the tenure by which a widow holds property that had devolved upon her by the death of her husband: and certainly the law, in this instance, as in many others, admits of great latitude of interpretation. It is well known, that between the Bengal and the other schools, there is a difference of opinion as to the circumstances under which a widow has a

* *Mitacc.*, chap., i., sec. xii., §§ 1 and 2
† See Elem. Hin. Law, App., page 59.

right to succeed to the property of her deceased husband. By the law as current in Bengal, as has been already observed, she is entitled to succeed, whether the husband was living in a state of union with, or separation from, his brethren; by that of other schools, only where the husband was separated from his brethren. So far, as to the right of succession, the law is clear and indisputable, but to what she succeeds is not so apparent. She has not an absolute proprietary right neither can she, in strictness, be called even a tenant for life; for the law provides her successors, and restricts her use of the property to very narrow limits. She cannot dispose of the smallest part, except for necessary purposes, and certain other objects particularly specified. It follows, then, that she can be considered in no other light than as a holder in trust for certain uses; so much so, that should she make waste, they who have the reversionary interest have clearly a right to restrain her from so doing. What constitutes waste, however, must be determined by the circumstances of each individual case. The law has not defined the limits of her discretion with sufficient accuracy, and it was probably never in the contemplation of the legislator that the widow should live apart from, and out of the personal control of, her husband's relations, or possess the ability to expend more than they might deem right and proper. In assigning a motive for the ordinance that a widow should succeed to her husband, and at the same time that she should be deprived of the advantages enjoyed by a tenant for life even, it seems most consistent with probability that it originated in a desire to secure, against all contingencies, a provision for the helpless widow, and thereby prevent her from having recourse to practices by which the fame and honour of the family might be tranished. By giving her a nominal property, she acquires consideration and respectability, and by making her the depositary of the wealth, she is guarded against the neglect or cruelty of her husband's rela-

tions. At the same time, by limiting her power, a barrier is raised against the effects of female improvidence and worldly inexperience. This opinion receives corroboration from the distinction which prevails in the Benares school, which may be said to be the fountain and source of all Hindu law. By the provisions of that code, where the brothers are united with the deceased husband, and where consequently it is fair to presume a spirit of friendship and cordiality, and there is no reason to anticipate that the widow will be treated with neglect by the brothers, she is declared to have no right of succession. It is only where the family is divided, and where there might consequently be reason to apprehend a want of brotherly feeling, that the law deems it necessary to interpose, and protect her interests. And it may be here observed that, if a man die leaving more than one widow (three widows, for instance), the property, is considered as vesting in only one individual: thus, on the death of one or two of the widows, the survivor or survivors take the property, and no part vests in the other heirs of the husband until after the death of all the widows.

According to the doctrine of the *Smriti Chandrică*, which is of great and paramount authority in the south of India, a widow, being the mother of daughters, takes her husband's property, both moveable, and immoveable, where the family is divided; but a childless widow takes only the moveable property. Where there are two widows, one the mother of daughters and the other childless, the former alone takes the immoveable estate, and the moveable property is equally divided between them.

Of the daughter.

In default of the widow, the daughter inherits, but neither is her interest absolute. According to the doctrine of the Bengal school, the unmarried daughter is first entitled to the succession: if there be no maiden daughter, then the daughter who has, and the daughter who is likely to have, male

issue, are together entitled to the succession ;* and on failure of either of them, the other takes the heritage. Under no circumstances can the daughters, who are either barren, or widows destitute of male issue, or the mothers of daughters only, inherit the property.

Distinction in the Benares school.

But there is a difference in the law, as it obtains in Benares, on this point, that school holding that a maiden is in the first instance entitled to the property; failing her, that the succession devolves on the married daughters who are indigent, to the exclusion of the wealthy daughters; that, in default of indigent daughters, the wealthy daughters are competent to inherit; but no preference is given to a daughter who has, or is likely to have, male issue, over a daughter who is barren, or a childless widow.

And in the Mithila school.

According to the law of Mithila, an unmarried daughter is preferred to one who is married: failing her, married daughters are entitled to the inheritance; but there is no distinction made among the married daughters; and one who is married, and has, or is likely to have, issue, is not preferred to one who is widowed and barren; nor is there any distinction made between indigence and wealth.

And where the family is undivided.

It may here be mentioned that the above rule of succession is applicable to Bengal in every possible case; but, elsewhere, only where the family is divided: for, according to the doctrine of the Benares and other schools, even the widow, to whom the daughter is postponed, can never inherit, where the family is in a state of union; nor can the mother, daughter, daughter's son, or grandmother. The father's heirs in such case exclude them. But though the

* A distinction is made by *Sricrishna* in his commentary on the *Dáyabhága* in respect of unmarried daughters. He is of opinion that the daughter who is not betrothed is first entitled to the inheritance, and in her default the daughter who is betrothed; but this doctrine is not concurred in by any other authority, and the author of the *Dayaruhasya* expressly impugns it as untenable.

schools differ on these points, they concur in opinion as to the manner in which such property devolves on the daughter's death, in default of issue male. According to the law as received in Benares and elsewhere, it does not go, as her *stridhun*, to her husband or other heir; and, according to the law of Bengal also, it reverts to her father's heir.* In the case of Rajchunder Das *versus* Dhunmunee, it was determined that, according to the Hindu law as current in Bengal, on the death of a widow who had claimed her husband's property, her daughter will inherit, to the exclusion of her husband's brother, if the daughter have or is likely to have male issue: and on her death without issue, her father's brother will inherit, to the exclusion of her husband.† But a curious case arose at Bombay,‡ involving the daughter's right, which deserves notice in this place. Of two widows, one had two sons, and the other a daughter. On the death of the latter widow, it became a question who was to succeed to her property, whether her daughter or the rival widow's sons. Various authorities were consulted, and they inclined to the opinion that the daughter was not entitled to succeed as heir, inasmuch as property which had devolved on a widow, reverts at her death to her husband's heirs, among whom the daughter would have ranked, in default only of her own brothers.

Of the daughter's sons.

According to the law of Bengal and Benares, the daughter's sons inherit, in default of the qualified daughters; but the right of daughter's sons is not recognized by the Mithila school. If there be sons of more than one daughter, they

* It has been asserted by the author of the Elements of Hindu Law, page 161, that property, devolved on a daughter by inheritance, is classed by the southern authorities as *stridhun*, and descends accordingly. The authority cited for this doctrine is to be found in that part of the *Mitacshara* treating of woman's peculiar property, and consequently applies to the descent of that alone. I have not been able to meet with any other.

† Sudder Dewanny Adawlut Reports, vol. iii., page 362.

‡ Elem. Hindu Law, Appendix, p. 392.

Of daughters sons.

take *per capita*, and not as the son's sons do *per stirpes*.* If one of several daughters, who had, as maidens, succeeded to their father's property, die leaving sons and sisters or sisters' sons, then, according to the law of Bengal, the sons alone take the share to which their mother was entitled, to the exclusion of the sisters and sisters' sons;† and, if one of several daughters, who had, as married women, succeeded their father, die leaving sons, sisters, or sisters' sons, according to the same law, the sisters exclude the sons; and if there be no sister, the property will be equally shared by her sons and her sisters' sons. This distinction does not seem to prevail anywhere but in Bengal. The author of the Considerations on Hindu Law has stated the following case:—"If there be three sisters who succeed jointly to their father's estate, A, B, and C, and supposing A to die childless, and B and C to survive her. Supposing also B to have one son, and C to have three sons, and supposing C to have died before A, and B to have survived her; it is agreed that, upon the death of A, her estate will go to B; but whether on the death of B, it shall go to her *only* son, or be divided between him and the three sons of C, is *vexata quæstio*." In this case, I apprehend, that if the property had devolved on the daughters at the time they were maidens, then on C's death her pro-

* The same author states (page 160) that "where such sons are numerous, when they do take, they take *per stirpes*, and not *per capita*." But the reverse of this is proved by the authority cited in its favour, Dig. vol. iii., page 501. *Jagannatha* there lays down the following rule: "Again, if daughters' sons be numerous, a distribution must be made. In that case, if there be two sons of one daughter, and three of another, five equal shares must be allotted: they shall not first divide the estate in two parts and afterwards allot one share to each son." This principle was maintained also in the case of Ramdhun Sein and others *v.* Kishenkaunt Sein and others, it being therein determined that grandsons by different mothers claiming their maternal grandfather's property take *per capita*, and not *per stirpes*. Sudder Dewanny Adawlut Reports, vol. iii., p. 100.

† Conformably to this doctrine, a case which originated in the *zillah* court of Rungpore was decided by the Sudder Dewanny Adawlut on the 19th of April 1820, in which it was determined (see Reports, vol. ii., p. 26) that property inherited by a daughter goes at her death to her son or grandson, to the exclusion of her sister and sister's son.

perty would go to her three sons, and not to her sisters; but if they were married at the time, it would go to her sisters; and on the death of A, to B; and on the death of B, her son and the sons of C would take *per capita*, and this upon the general principle that property which had devolved on a daughter is taken at her death by the heirs of her father, and not by the heirs of the daughter, and the father's heirs in this case are his daughter' sons, who are entitled to equal shares.* Under no circumstances can a daughter's son's son or other descendant, or her daughter or husband, inherit immediately from her the property which devolved on her at her father's death: such property, according to the tenets of all the schools, will devolve on her father's next heir, and will not go, as her *stridhun*, to her own heir.

Of the father.

In default of daughter's sons, the father inherits, according to the law as current in Bengal; but according to other schools,† the mother succeeds to the exclusion of the father.

Of the mother.

In default of the father, the mother inherits. Her interest, however, is not absolute, and is of a nature similar to that of the widow. In a case of property which had devolved on a mother by the decease of her son, the law-officers of the Sudder Dewanny Adawlut held that the rules concerning property devolving on a widow, equally affect property devolving on a mother.‡ On her death, the property devolves on the heirs of her son, and not on her heirs.

Of the brothers.

In default of father and mother, brothers inherit: first, the uterine associated brethren; next, the unassociated bre-

* *Jim. Vah*, in the *Ddyabhdga*, chap. xi, sec. 1, §§ 65, ii.—See Case 5, Chap. Rights of Daughters, &c., vol. ii.

† The different opinions on this point have been more fully stated in the note to Case 14, Rights of Daughters, &c., vol. ii.

‡ Case of Musst. Bijia Dibia v. Unnapoorna Dibiá, S. D. A. Reports, vol. i., p. 164.

thren of the whole blood; thirdly, the associated brethren of the half blood; and, fourthly, the unassociated brethren of the half blood. The above order supposes that the deceased had only uterine or only half brothers, and that they were either all united or all separated. But, if a man die, leaving an uterine brother separated, and an half brother associated or re-united, these two will inherit the property in equal shares. Sisters are not enumerated in the order of heirs.

In a case recently decided in the Sudder Dewanny Adawlut, a question arose to the relative rights of a brother and a brother's son to succeed, on the death of a widow, to property which had devolved on her at the death of her husband, they being the next heirs. The Pundits at first declared that a brother's son (his father being dead) was entitled to inherit together with the brother. But this opinion was subsequently proved and admitted to be erroneous. In the succession to the estate of a grandfather, the right of representation unquestionably exists; that is to say, the son of a deceased son inherits together with his uncle: not so in the case of property left by a brother, the brother's son being enumerated in the order of heirs to a childless person's estate after the brother, and entitled to succeed only default of the latter. In the case in question, the deceased left two brothers and a widow, and the widow succeeding, one of the brothers died during the time she held possession. The son of the brother who so died claimed, on the death of the widow, to inherit together with his uncle, and the fallacy of the opinion which maintained the justice of his claim consisted in supposing that, on the death of the first brother, the right of inheritance of his other two surviving brothers immediately accrued, and that the dormant right of the brother who died secondly was transmitted to his son. But, in point of fact, while the widow survived, neither brother had even an inchoate right to inherit the property, and conse-

quently the brother who died during her lifetime could not have transmitted to his son a right which never appertained to himself.*

In default of brothers, their sons inherit in the same order; but, in regard to their succession, there is this peculiarity, that if a brother's sons, whose father died previously to the devolution of the property, claim by right of representation, they take *per stirpes* with their uncle, being in that case grandsons inheriting with a son; but when the succession devolves on the brother's sons alone as nephews, they take *per capita*, as daughters' sons do. In the *Subodhini* it is stated that the succession cannot, under any circumstances, take place *per capita*, but this opinion is overruled. He maintains, also, that daughters of brothers inherit. In this opinion he is joined by *Nanda Pandita*, but the doctrine is elsewhere universally rejected.† Of the brother's son.

In default of brothers' sons, their grandsons inherit in the same order, and in the same manner,‡ according to the law as current in Bengal; but the law of Benares, Mithilá, and other provinces, does not enumerate the brother's grandson in the order of heirs, and assigns to the paternal grandmother the place next to the brother's son. And grandsons. Distinction.

Thus far, with the exceptions above noticed, the several schools concur as to the order of inheritance; but they differ more considerably with respect to the remoter heirs, as will be noticed hereafter.

In default of brothers' grandsons, sisters' sons inherit, according to the law of Bengal; but according to other schools, Of sisters' sons.

* Case of Roodurchunder Chowdhry *v.* Sumbhoo Chunder Chowdhry, Sudder Dewanny Adawlut Reports, vol. iii., page 106. The same doctrine was maintained in the case of Musst. Jymanee Dibia *versus* Ramjoy Chowdhry, ibid, 289.

† See note to *Mitacshará*, page 348.

‡ It may be here observed, however, that no re-union after separation can take place with a grandson's brother. Re-union can take place only with the three following relations: the father, the brother, and the paternal uncle. *Vrihaspati*, cited in the *Dáyabhága*, chap. xi., sec. 1, § § 30.

the paternal grandmother, as above stated, is ranked next to the brother's son, and the sister's son also is excluded from the enumerated heirs. This point of law was established in a case decided by the Sudder Dewanny Adawlut, in which the suit being for the landed estate of a deceased Hindu situated in Bengal, by the son of his sister against the son of his paternal uncle, it was ruled that, according to the law of Bengal, the plaintiff would be heir, but according to the law of Mithilá the defendant.*

Of the other heirs according to the *Dayacrama-sangraha.*

There is a difference of opinion among different writers of the Bengal school as to the whole and half blood; some maintaining that an uterine sister's son excludes the son of a sister of the half blood; but, according to the most approved authorities, *there should be no distinction.* A sister's daughter is nowhere enumerated in the order of heirs.†

In default of sisters' sons, the inheritance is thus continued, agreeably to the doctrine of the Bengal school, as laid down in the *Dáyacramasangraha:* Brother's daughter's son—Paternal grandfather—Paternal grandmother—Paternal uncle, his son and grandson—Paternal grandfather's daughter's son—Paternal uncle's daughter's son—Paternal great-grandfather—Paternal great-grandmother—Paternal grandfather's brother, his son and grandson—Paternal great-grandfather's daughter's son, and his brother's daughter's son. On failure of all these, the inheritance goes in the maternal line to the maternal grandfather;‡ the maternal uncle; his son and grandson, and daughter's son; the maternal

* Case of Rajchunder Narain *v.* Goculchunder Goh, S. D. A. Reports, vol. i., page 43. See also Case 6, page 125, vol. ii.

† *Nanda Pandita* and *Balambhatta* maintain that the daughters also of sisters have a right of inheritance, but their opinion is universally rejected on this point. See note to *Mitacshara*, page 348. See also a case roported in Appendix, Elem. Hindu Law, page 249.

‡ It has been remarked by *Jagannatha* (page 530, vol. iii.) "that the son of a son's and of a grandson's daughter, and the son of a brother's and of a nephew's daughter, and so forth, claim succession in the ordor of proximity, before the maternal grandfather;" but this opinion does not seem to be supported by any authority.

great-grandfather, his son, grandson, great-grandson, and daughter's son; and to the maternal great-great-grandfather, his son, grandson, great-grandson, and daughter's son. In default of all these, the property goes to the remote kindred in the descending and ascending line, as far as the fourteenth in degree; then to the spiritual preceptor; the pupil; the fellow-student; those bearing the same family name; those descended from the same patriarch; Brahmins learned in the *Vedas;* and, lastly, to the king, to whom, however, the property of a Brahmin can never escheat, but must be distributed among other Brahmins.

The above order of succession, however, is by no means universally adhered to, even among the writers of the Bengal school. After the sister's son, *Sricrishna Tarcálancara*, in his commentary on the *Dáyabhága*, places the paternal uncle of the whole blood; the paternal uncle of the half blood; the son of the paternal uncle of the whole blood; the son of the paternal uncle of the half blood; their grandsons successively; the paternal grandfather's daughter's son; the paternal grandfather; the paternal grandmother; the paternal grandfather's uterine brother; his half brother; their sons and grandsons successively; the paternal great-grandfather's dauhter's son; the *Sapindas*; the maternal uncle and the rest, who present oblations which the deceased was bound to offer; the mother's sister's son; the maternal uncle's sons and grandsons; the grandson of the sons's son, and other descendants for three generations in succession; the offspring of the paternal grandfather's grandfather, and other ancestors for three generations; the *Samanodacas*; and, lastly, the spiritual teacher, &c., &c.

* See a Bombay case cited in Elem. Hindu Law, appendix, page 257, in which it was determined that a fellow-hermit is heir to an anchoret; his pupil to an ascetic; and his preceptor to a professed student of theology.

paternal great-grandfather, his son and grandson successively; the paternal great-grandfather's mother;* his father, his brother, his brother's son. In default of all these, the *Sapindas* in the same order as far as the seventh in degree, which includes only one grade higher in the order of ascent than the heirs above enumerated. In default of *Sapindas*, the *Samánodacas* succeed; and these include the above enumerated heirs in the same order as far as the fourteenth in degree.† In default of the *Samanodacas*, the *Bundhoos* or cognates succeed. These kindred are of three descriptions; personal, paternal, and maternal. The personal kindred are, the sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle. The paternal kindred are, the sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle. His maternal kindred are, the sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle.‡ In default of them, the *Achaiyya* or spiritual preceptor, the pupil, fellow-student in theology, learned Brahmins; and, lastly, always excepting the property of Brahmins, the estate escheats to the ruling power.

The order of succession as it obtains in Mithilá corresponds with what is here laid down. In the case of Gungadutt Jha *v.* Sreenarain and Musst. Leelawutee (Sudder Dewanny Adawlut Reports, vol. ii., page 11) it was determined that, according to the law as current in Mithilá, claimants to

* And in this case.

† The term *Gotraja* (or gentiles) has been defined to signify *Sapindas* and *Samanodacas* by *Balambhatta*, and in the *Subodhini*, &c.

‡ See *Mitacshara*, page 352. In this series, no provision appears to have been made for the maternal relations in the ascending line; but *Vachcspatimisra* in the *Vivadachintamani* assigns to "the maternal uncle and the rest" (*Matooladi*) a place in the order of succession next to the *Samanodacas*; and *Mitramisra*, in the *Veeramitrodaya*, expresses his opinion that as the maternal uncle's son inherits, himself should be held to have the same right by analogy.

inheritance, as far as the seventh (*Sapindas*) and even the fourteenth in descent (*Samanodacas*) in the male line from a common ancestor, are preferable to the cousin by the mother's side of the deceased proprietor; that is to say, his mother's sister's son. Had the case in question been decided according to the law of Bengal (which, the parties there residing, would have so happened, had it not been determined that a person settling in a foreign district shall not be deprived of the laws of his native district, provided he adhere to its customs and usages), the mother's sister's son would have obtained the preference; that individual ranking, agreeably to the law of Bengal, between the *Sapindas* and the *Samánodacas*, as was exemplified in the case of Roopchurn Mohapater *v.* Anund Lal Khan (Sudder Dewanny Adawlut Reports, vol. ii., page 35), in which it was determined, according to an exposition of the Hindu law as current in Bengal, that the son of a maternal uncle (who is also a *Bundhoo*) takes the inheritance in preference to lineal descendants from a common ancestor, beyond the third in ascent.

According to other schools.

The order of succession, agreeably to the law as current in the south of India, does not appear to differ from that of Benares.

In the *Vyavahára-mayūc'ha*, an authority of great eminence in the west of India, a considerable deviation from the above order appears; and the heirs, after the mother, are thus enumerated: The brother of the whole blood, his son, the paternal grandmother, the sister,* the paternal grandfather, and the brother of the half blood, who inherit

* The Bombay Reports, vol. ii., page 471, exhibit a case demonstrative of the sister's right according to this doctrine, and in a suit between two cousins for the property of their maternal uncle, it was held that neither had any right during the lifetime of their uncle's sister. There is another similar case in vol. i., page 71. But this admission of the sister seems peculiar to the doctrine followed on that side of India. See Colebrooke, cited in Appendix, Elem. Hindu Law, page 252.

together. In default of these, the *Sapindas* the *Samanodacas*, and the *Bundhoos* inherit successively, according to their degree of proximity.

It may be stated, as a general principle of the law as applicable to all the school, that he with whom rests the right of performing obsequis is entitled to preference in the order of succession; but there are exception to this rule; for instance, in the case of a widow dying and leaving a brother and daughter her surviving, the daughter takes to the exclusion of the brother, although the exequial ceremonies must be performed by the latter.* The passages of Hindu law which intimate that the succession to the estate and the right of performing obsequies go together do not imply that the mere act of celebrating the funeral rites gives a title to the succession, but that the successor is bound to the due performance of the last rites for the person whose wealth has devoled on him.†

* Elem. Hin. Law, App., pages 245 and 251.
† Note to S. D. A. Reports, vol. i., p. 22

CHAPTER III

OF STRIDHUN, OR WOMAN'S SEPARATE PROPERTY.

This description of property is not governed by the ordinary rules of inheritance. It is peculiar and distinct, and the succession to it varies according to circumstances. It varies according to the condition of the woman, and the means by which she became possessed of the property.*

In the *Mitácsharà*, whatever a woman may have acquired, whether by inheritance, purchase, partition, seizure, or finding is denominated woman's property, but it does not constitute her *peculium*. Authors differ in their enumeration of the various sorts of *stridhun*, some confining the number to eight, others to six, others to five, and others to three; but as the difference consists in a more or less comprehensive classification, it does not require any particular notice. The most comprehensive definition of a married woman's *peculium* is given in the following text of *Menu*:—"What was given before the nuptial fire, what was given at the bridal procession, what was given in token of love, and what was received from a mother, a brother, or a father, are considered as the sixfold separate

Definition of *stridhun* according to *Menu*.

* According to the Hindu law, there are several sorts of this species of property, some of which are as follows: *Adhyagnica*, or what was given before the nuptial fire; *Adhyabahana*, or what was given at the bridal procession; *Prectidutta*, or what was given in token of affection; *Matripitri* and *Bhratridutta*, or what was received from a mother, father, and brother; *Adhividhanica*, or a gift on a second marriage, *i. e.*, wealth given by a man for the sake of satisfying his first wife, when desirous of espousing a second; *Paranayayung*, or *Paraphernalia*, *Anwadhayica*, or gift subsequent; *Soudayica*, or gift from affectionate kindred; *Sulca*, or perquisite; *Yautuca*, or what was received at marriage; *Padabundanica*, or what was given to the wife in return of her humble salutation. Some lawyers class the *Prectidutta* and the *Padabundanica* as one species of woman's property, under the appellation of *Lauanyarjita*, or was gained by loveliness.

property of a married woman."* And it may be here observed that *stridhun* which has once devolved according to the law of succession which governs the descent of this peculiar species of property ceases to be ranked as such, and is ever afterwards governed by the ordinary rules of inheritance: for instance, property given to a woman on her marriage is *stridhun*, and passes to her daughter at her death; but at the daughter's death it passes to the heir of the daughter like other property; and the brother of her mother would be heir in preference to her own daughter, such daughter being a widow without issue.

Succession to.

Where the deceased was unmarried;

To such property left by an unmarried woman, the heirs are her brother, her father, and her mother successively; and failing these, her paternal kinsmen in due order.

And where married.

To such property left by a married woman given to her at the time of her nuptials, the heirs are her daughters; the maiden, as in the ordinary law of inheritance, ranking first, and then the married daughter likely to have male issue.† The barren and the widowed daughters, failing the two first, succeed as coheirs. In default of daughters, the son succeeds; then the daughter's son,‡ the son's son, the great-grandson in the male line, the son of a contemporary wife, her grandson and her great-grandson in the male line. In default of all these descendants, supposing the marriage to have been celebrated according to any of the five first forms,§ the husband succeeds, and the brother, the mother, the father. But if cele-

* § 305.

† It may here be mentioned that at the death of a maiden or betrothed daughter on whom the inheritance had devolved, and who prove barren, or on the death of a widow who had not given birth to a son, the succession of the property which they had so inherited will devolve next on the sisters having, and likely to have male issue; and in their default, on the barren and widowed daughters.

‡ According to *Jimutavahana*, the right of the daughter's son is postponed to that of the son of the contemporary wife; but his opinion in this respect is refuted by *Sricrishna* and other eminent authorities.

§ For an enumeration of these forms, see the chapter on Marriage.

brated according to any of the three last forms,* the brother is preferred to the husband, and both are postponed to the mother and father. In default of these, the heirs are successively as follows:—Husband's younger brother, his younger brother's son, his elder brother's son, the sister's son, husband's sister's son, the brother's son, the son-in-law, the father-in-law, the elder brother-in-law, the *Sapindas*, the *Saculyas*, the *Samanadocas*.

And if given to her by her father.

To such property left by a married woman given to her by her father, but not at the time of her nuptials, the heirs are, successively, a maiden daughter, a son, a daughter who has or is likely to have male issue, daughter's son, son's son, son's grandson, the great-grandson in the male line, the son of a contemporary wife, her grandson, her great-grandson in the male line. In default of all these, the barren and the widowed daughters succeed as coheirs, and then the succession goes as in the five first forms of marriage.

And if not given to her by her father.

To such property left by a married woman not given to her by her father, and not given to her at the time of her nuptials, the heirs are in the same order as above, with the exception that the son and unmarried daughter inherit together, and not successively, and that the son's son is preferred to the daughter's son.†

Power of a woman over her *stridhun*.

It may here be observed that the Hindu law recognizes the absolute dominion of a married woman over her separate and peculiar property, except land given to her by her husband, of which she is at liberty to make any disposition

* The justice of the order of succession does not at first sight seem obvious, at least as regards the *Asura* marriage, where money is advanced by the family of the bridegroom, and to which, therefore, it would appear equitable that it should revert on the death of the bride.

† But *Raghunandana* holds that in the case of a married woman dying without issue, the husband alone has a right to the property of his wife, bestowed on her by him after marriage; but that the brother has in such case the prior right to any property which may have been given to her by her father and mother.

at pleasure. He has nevertheless power to use the woman's *peculium*, and consume it in case of distress; and she is subject to his control, even in regard to her separate and peculiar property.*

* The order above given is chiefly taken from Colebrooke's translation of the *Dayabhaga*, page 100. I do not find that the law in this particular varies materially in the different schools, except that (as in the case of succession to ordinary property) a distinction is made by the law of Benares and other schools between wealthy and indigent daughters. There are also many other nice distinctions and discrepancies of opinion, of which the following are specimens, and which it is unimportant to notice at greater length in this place. According to *Jimutahvahana* and the mass of Bengal authorities, the property of a deceased woman not received at her nuptials, and not given to her by her father, goes to her son and to her unmarried daughters in equal portions, whether the latter have been betrothed or otherwise. *Jagannatha* is of opinion that the succession of a daughter who has been betrothed is barred by the claim of one who has not been affianced, and that both cannot have an equal right to inherit with a brother. *Raghunandana* denies that there is any text justifying the succession of a betrothed daughter. The authors of the *Vyavaharamayuc'ha* and *Veeramitrodaya* distinctly state that, in default of a maidon daughter a married one, whose husband is living, takes the inheritance with her brother. According to the *Mitacshara* and other ancient authorities current in Benares, the brothers and sisters cannot, under any circumstances, inherit together; while *Madhavacharjya* states that sons and daughtees inherit their mother's *peculium* together, only where it was derived from the family of the husband; and *Vachespati Bhuttacharjya*, on the other hand, contends that they inherit simultaneously in every instance, excepting that of property received at nuptials, and given by parents. The conflicting doctrines in matters such as the above of minor moment, might be multiplied almost *ad infinitum*.

CHAPTER IV.
OF PARTITION.

Having treated of the subject of property acquired by succession, it remains to treat of that which is acquired by partition while the ancestor survives, and by partition among the heirs, after succession.

Father's consent requisite to partition in Bengal.

The father's consent is requisite to partition, and, while he lives, the sons have not, according to the law of Bengal, the power to exact it, excepting under such circumstances as would altogether divest him of his proprietary right, such as his degradation, or his adoption of a religious life.

Exception.

Opinion of *Jagannatha*.

Jagannatha has, indeed, expressed an opinion, that sons, oppressed by a step-mother or the like, may apply to the king, and obtain a partition from their father of the patrimony inheriter from the grandfather, though not a partition of wealth acquired by the father himself.

Condition.

To the father's right of making a partition there is but one condition annexed, namely, that the mother be past child-bearing, and this condition applies to ancestral immoveable property alone: as to his self-acquired estate, whether it consists of moveable or immoveable property, and the ancestral property of whatever description which may have been usurped by a stranger, but recovered by the father, his own consent is the only requisite to partition.

Partition of ancestral estate demandable by sons according to the law of Benares.

But the law as current in Benares and other schools differs widely from that of Bengal in respect to partition of the ancestral estate, which, according to the former, may be enforced at the pleasure of the sons if the mother be incapable of bearing more issue, even though the father retain his worldly affections, and though he be averse to partition.*

* *Mitac.*, ch. i., sec. 2. § 7.

How to be made by the father according to the law of Bengal.

According to the law of Bengal, the father may make an unequal distribution of property acquired by himself exclusively, as well as of moveable ancestral property, and of property of whatever description, recovered by himself, retaining in his own hands as much as he may think fit; and should the distribution he makes be unequal, or should he without just cause exclude any one of his sons, the act is valid, though sinful; not so with respect to the ancestral immoveable estate and property, to the acquisition of which his sons may have contributed; of such property the sons are entitled to equal shares; but the father may retain a double share of it, as well as of acquisitions made by his sons.

And Benares

The law of Benares, on the other hand, prohibits any unequal distribution by the father of ancestral property of whatever description, as well as of immoveable property acquired by himself. At a distribution of his own personal acquisitions even, he cannot, according to the same law, reserve more than two shares for himself; and as the maxim of *factum valet* does not apply in that school, any unequal distribution of real property must be considered as not only sinful, but illegal.*

This subject has been treated of at great length by the author of the Considerations on Hindu Law, in the chapter on gifts and unequal distribution; and though he confesses it to be one of a most perplexing nature, from the variety of opposite decisions to which it has given rise, yet he inclines to the opinion that a gift of even the entire ancestral immoveable property to one son, to the exclusion of the rest, is sinful, nevertheless *valid*, if made. It must be recollected that he was treating of the law as current in Bengal

*Though the father is not precluded from disposing of moveables at his discretion, a *gift* of such property to one son should not be deemed invalid (Colebrooke, cited in Elem. Hin. Law. App., p. 5); and as to the father's incompetency to dispose of immoveable property, though acquired by himself, see ibid, p. 7.

only, and not elsewhere. My reasons for arriving at an opposite opinion are: first, because the doctrine for which I contend has been established by the latest decision, founded on a more minute and deliberate investigation of the law of the case than had ever before been made; and, secondly, because the only authority for the reverse of this doctrine consists in the following passages from the *Dáyabhága*:—"The texts of *Vyása* exhibiting a prohibition are intended to show a moral offence; they are not meant to invalidate the sale or other transfer. Therefore, since it is denied that a gift or sale should be made, the precept is infringed by making one; but the gift to transfer is not null, for a fact cannot be altered by a hundred texts." Now, if these passages are to be taken in a general sense; if they are to be held to have the effect of legalizing, or at least rendering valid, all acts committed in direct opposition to the law, they must have the effect of superseding all law; and it would be better at once to pronounce those texts alone to be the guide for our judicial decisions. The example adduced by the commentator to illustrate these texts clearly shows the spirit in which this unmeaning, though mischievous, dogma was delivered; he declares that a fact cannot be altered by a hundred texts, in the same manner as the murder of a Brāhmin, though in the highest degree criminal and unlawful, having been perpetrated, there is no remedy, or, in other words, that the defunct Brahmin cannot be brought to life again. The illustration might be opposite, if there were no such thing as retribution, and if the law did not exact all possible amends for the injury inflicted. But what renders this conclusion less disputable is, that the texts of *Vyàsa* in question occur in the chapter of the *Dàyabhàga* which treats of self-acquisitions, and has no reference to ancestral property. If any additional proof be wanting of the father's incompetency to dispose of ancestral real property by an unequal partition, or to do any other act with respect to it which might

Argument against unequal partition in certain cases.

be prejudicial to the interests of his son, I would merely refer to the provision contained in chap. iii., sect. 7, § 10, of the translation of the extract from the *Mitàcschará* relative to judicial proceedings. The rule is in the following terms: "The ownership of father and son is the same in land which was acquired by his father," &c. From this text it appears that "in the case of land acquired by the grandfather, the ownership of father and son is equal; and therefore, if the father make away with the immoveable property so acquired by the grandfather, and if the son has recourse to a court of justice, a judicial proceeding will be entertained between the father and son." The passage occurs in a dissertation as to who are fit parties in judicial proceedings; and although the indecorum of a contest wherein the father and son are litigant parties has been expressly recognized, yet, at the same time, the rights of the son are declared to be of so inviolable a nature, that an action by him for the maintenance of them will lie against his father, and that it is better there should be a breach of moral decorum than a violation of legal right.

Cases cited. The question as to the extent to which an unequal distribution made by a father in the province of Bengal should be upheld has been amply discussed also in the report of a case decided by the Court of Sudder Dewanny Adawlut in the year 1816,* wherein it was determined that an unequal distribution of ancestral immoveable property is illegal and invalid, and that the unequal distribution of property acquired by the father, and of moveable ancestral property, is legal and valid, unless when made under the influence of a motive which is held in law to deprive a person of the power to make a distribution. It was declared, in a note to that case, that the validity of an unequal distribution of ancestral

* For the whole of the argument, see Sudder Dewanny Adawlut Reports, vol. ii., page 214.

immoveable property, such as is expressly forbidden by the received authorities on Hindu law, cannot be maintained on any construction of that law, by *Jimutaváhana* or others. *Jagannátha*, in his Digest, maintains an opinion opposite to this, and lays it down that, if a father, infringing the law, absolutely give away the whole or part of the immoveable ancestral property, such gift is valid, provided he be not under the influence of anger or other disqualifying motive: and admitting this doctrine to be correct, it must be inferred, *à fortiori*, that he is authorized to make an unequal distribution of such property; but the reverse of this doctrine has been established by the mass of authorities cited in the case above alluded to.

Opinion of *Jagannatha* over-rules.

In the event of a son being born after partition made by the father, he will be sole heir to the property retained by the father; and if none have been retained, the other sons are bound to contribute to a share out of their portions. According to *Jimutaváhana*, *Raghunandana*, *Sricrishna*, and other Bengal authors, when partition is made by a father, a share equal to that of a son must be given to the childless wife, not to her who has male issue. But the doctrine laid down by *Harinatha* is, that if the father reserve to or more shares, no share need be assigned to the wives because their maintenance may be supplied out of the portion reserved. It is also laid down in the *Vivadarnavasetu* that an equal share to a wife is ordained in a case where the father gives equal shares to his son; but that, where he gives unequal portions, and reserves a larger share for himself, he is bound to allot to each of his wives, from the property reserved by himself, as much as may amount to the average share of a son. These shares to wives are alloted only in case of no property having been given to them. According to some authorities, if she had received property elsewhere a moiety of a son's share should be allotted to her; but according to other authorities, the difference should be made

Right of sons born after partition.

Childless wives entitled to share according to Bengal authorities.

Opinion of *Harinatha*

Vivádarnava, setu.

up to them between what they have received and a son's share. The doctrine maintained by *Jagannàtha* is, that if the wife has received, from any quarter, wealth which would have devolved ultimately on her husband, such wealth should be included in the calculation of her allotment; but if she received the property from her own father or other relative, or from the maternal uncle or other collateral kinsman of her husband, it should not be included, her husband not having any interest therein.

Rule where the wife has received property.

The law as current in Benaras, Mithila and elsewhere, differs from the Bengal school on this subject, and is not in itself uniform or consistent. *Vijnyaneswara* ordains: "When the father, by his own choice, makes all his sons partakers of equal portions, his wives, to whom peculiar property had not been given by their husband or fother-in-law, must be made participants of shares equal to those of sons." But if separate property had been given, the same authority subsequently directs the allotment of half a share: "or if any had been given, let him assign the half." According to *Madhavàcharjya*, if the father by his own free will make his sons equal participants, he ought to make his wives, to whom no separate property has been given, partakers of a share equal to that of a son; but if such property has been presented to her, then a moiety should be given. *Cumulacara*, the author of the *Vivàdatandava*, declares generally that, whether the father be living or dead, his wives are respectively entitled to a son's portion. But *Sulapani*, in the *Dipacalica*, maintains that, if the father made an equal partition among his sons by his own choice, he must give equal shares to such of his wives only as have no male issue: and *Helayudha* also lays it down that wives who have no sons are here intended. *Misra* contends that "when he reserves the greater part of his fortune, and gives sons a trifle to his sons, or takes a double share for himsef, the husband must give so much wealth to his wives out of his own share alone;

Doctrines of the Benares and other schools as to the shares of wives.

accordingly, the separate delivery of shares to wives is only ordained when he makes an equal partition." The sum of the above arguments seems to be, that in the case of an equal partition made by a father among his sons, his wives who are destitute of male issue take equal portions; that, where he reserves a large portion for himself, his wives are not entitled to any specific share, but must be maintained by him; and that, where unequal shares are given to sons, the average of the shares of the sons should be taken for the purpose of ascertaining the allotments of the wives. The same rules apply also to paternal grandmothers, in case of partition of the ancestral property.

Sum of the arguments.

At any time after the death, natural or civil, of their parents, the brethren are competent to come to a partition among themselves of the property, moveable and immoveable, ancestral and acquired; and, according to the law as received in the province of Bengal, the widow is not only entitled to share an undivided estate with the brethren of her husband, but she may require from them a partition of it although her allotment will devolve on the heirs of her husband after her decease.* Partition may be made also while the mother survives. This rule, though at variance with the doctrine of *Jimutavahana*, has nevertheless been maintained by more modern authorities, and is universally observed in practice.†

Partition when to be made by brethren.

Nephews whose fathers are dead are entitled, as far as the fourth in descent, to participate equally with the brethren. These take *per stirpes*, and any one of the co-parceners may insist on the partition of his share.‡

Rights of nephews.

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* See note to the case of Bhyroochund Rai v. Russomunee, Sudder Dewanny Adawlut Reports, vol. i., p. 28, and case of Nilkaunt Rai v. Munee Chowdrain, ibid, 58; also case of Rani Bhawani Dibia and another v. Ranee Soornjmunee, ibid, p. 135. The reverse is the case, according to the law of Benares. See the case of Duljeet Sing v. Sheomanook Singh, v. ibid, 59.

† Dig., 3, 78.

‡ *Catyayana*, cited in Dig., 3, 7; and see Elem. Hindu Law, Appendix, 202.

Of mothers & daughters.

But, in all such cases, to each of the father's wives who is a mother, must be assigned a share equal to that of a son, and to the childless wives a sufficient maintenance; but according to the *Mitacshara* and other works current in Benares and the southern provinces, childless wives are also entitle to shares, the term *mata* being interpreted to signify both mother and step-mother. The *Smritichandrica* is the only authority which altogether excludes a mother from the right of participation. To the unmarried daughters such portions are allotted as may suffice for the due celebration of their nuptials.* This portion has been fixed at a fourth of the share of a brother: in other words, supposing there is one son and one daughter, the estate should be made into two parts, and one of those two parts made into four. The daughter takes one of these fourths. If there be two sons and one daughter, the estate should be made into three parts, and one of these three parts made into four. The daughter takes one of these fourths, or a twelfth. If there be one son and two daughters, the estate should be made into three parts, and two of three these parts made into four. The daughters take each one of these fourths.† But according to the best authorities, these porportions are not universally assignable; for where the estate is either too small to abmit of this being given without inconvenience, or too large to renden the gift of such portion unnecessary to the due celebration of the nuptials, the sisters are entitle to so much only as may suffice to defray the expenses of the marriage ceremony.

Sisters' interests undefined.

In fine, this provision for the sisters, intended to uphold the general respectabilty of the family, is accorded rather as a matter of indulgence, than prescribed as a matter of right.‡

* Ibid, 86 and 97.

† *Mit*, on Inh., chap. i.. § 7.

‡ The question has been fully discussd by the author of the Considerations on Hindu Law, page 103 *et seq.* The inconsistency of the rules has been pointed out; but the same conclusion is arrived at, namely, that the sister's is a claim rather than a right. See the opinion of Mr. Sutherland, cited in Elem. Hin. Law, App.. p. 301. which is to the same effect; and of Mr. Colebrook, ibid, pp. 361 and 385,

Any improvement to joint property effected by one of the brethren does not confer on him a title to a greater share ;* but an acquisition made by one, by means of his own unassisted and exclusive labour, entitles the acquirer, according to the law as current in Bengal, to a double share on partition. And it was ruled by the Sudder Dewanny Adawlut, that where an estate is acquired by one of four brothers living together, either with aid from joint funds, or with personal aid from the brothers, two-fifths should be given to the acquirer, and one-fifth to each of the other three.† But according to the law as current in Benares, the fact of one brother's having contributed personal labour, while no exertion was made by the other, is not a ground of distinction. If the patrimonial stock was used, all the brethren share alike.‡ If the joint stock have not been used,§ he by whose sole labour the acquisition has been made is alone entitled to the benefit of it.‖ And where property has been acquired without aid from joint funds, by the exclusive industry of one member of an undivided family, others of the same family, although they were at the time living in coparcenary with him, have no right to participate in his acquisition.¶ The rule is the same with respect to property recovered, excepting land, of which the party recovering it is entitled to a fourth more than the rest of his brethren.** It has also been ruled that, if lands are acquired partly by the labour of one brother, and partly by the capital of another, each is entitled to half a share ; and that, if they

Share of the acquirer.

According to the law of Benares.

Case of land recovered.

* *Mitac.*; chap i., sec. 3, § 4 ; and Case 15, vol. ii., Chap. Effects liable and not liable to Partition (note).

† S. D. A. Rep., vol., i., page 6.

‡ See note Case 4, Chap. of Sons, &c., vol. ii.

§ What constitutes the use of joint stock is not unfrequently very difficult to determine, and no general rule can be laid down applicable to all cases that may arise. Each individual case must be decided on its own merits. See Elem. Hin. Law, App., p. 306.

‖ Dig., 3, 110.

¶ Kaleepershad Rai and others *v.* Digumber Rai and others, S. D. A. Reports, vol. ii. p. 237.

** *Sancha*, cited in ibid, 365 ; and Elem, Hin. Law, app., p. 313.

were acquired by the joint labour and capital of one, and by the labour only of the other, two-thirds should belong to the former, and one-third to the latter; but this provision seems rather to be founded on a principle of equity than any specific rule of Hindu law.*

Property not subject to partition.

Presents received at nuptials, as well as the acquisitions of learning and valour, are, generally speaking, not claimable by the brethren on partition; and there are some things not subject to the ordinary law of partition; but for a more detailed account of indivisible and specially partible, the reader is referred to the translation of *Jagannátha's* Digest, vol. iii., page 332 *et seq.*, and to the chapter in vol. ii., treating of effects liable and not liable to partition. According to the more correct opinion, where there is an undivided residue, it is not subject to the ordinary rules of partition of joint property: in other words, if at a general partition any part of the property was left joint, the widow of a deceased brother will not participate, notwithstanding the separation; but such undivided residue will go exclusively to the brother.†

Evidence of partition.

Partition may be made without having recourse to writing or other formality; and in the event of its being disputed at any subsequent period, the fact may be ascertained by circumstantial evidence. It cannot always be inferred from the manner in which the brethren live, as they may reside apparently in a state of union, and yet, in matters of property, each may be separate; while, on the other hand, they may reside apart, and yet may be in a state of union with respect to property: though it undoubtedly is one among the presumptive proofs to which recourse may be had, in a case of uncertainty, to determine whether a family be united or

* Case of Koshul Chukrawutee *v.* Radhanauth, S. D. A. Reports, vol. i., page 336.

† Elem. Hin. Law, App., p. 322.

separate in regard to acquisitions and property.* The only criterion seems to consist in their entering into distinct contracts, in their becoming sureties one for the other, or in their separate performance of other similar acts, which tend to show that they have no dependance on or connexion with each other.† In case of an undivided Hindu family the Court of Sudder Dewanny Adawlut were of opinion that their acquisitions should be presumed to have been joint till proved otherwise, the *onus probandi* resting with the party claiming exclusive right ;‡ and, in another case, a member of a Hindu family, among whom there had been no formal articles of separation, but who, as well as his father, messed separately from the rest, and had no share of their profits and loss in trade, though he had occasionally been employed by them, and had received supplies for his private expenses, was presumed to be separate, and not allowed a share of the acquistion made by others of the family.§ The law is particularly careful of the rights of those who may be born subsequent to a partition made by the father. With respect to ancestral property, it is not likely that the just claims of any of the heirs can be defeated, as the law prohibits partition so long as the mother is capable of bearing issue ; but to guard against the possibility of such an occurrence, it is provided that the father shall retain two shares, to which shares, if a son be subsequently born, he is exclusively entitled. There is another provision also which forms an effectual safeguard against the distitution of children born subsequently to a partition, which consists in the father's right of resumption, in case of necessity, of the property which he may have distributed among his sons.‖

* See note to S. D. A. Reports, vol. i., p. 36.

† Dig., 3, 414 ; and see cases. Chap. of Evidence of Partition ; also Colebrooke, cited in Appendix Elem. Hindu Law, p. 325 *et seq.*

‡ Case of Gourchunder Rai and others *v.* Hurrochunder Rai and others, S. D. A. Reports, vol. iv., p. 162.

§ Rajkishor Rai and others *v.* the widow of Santoo Das, S. D. A. Report, vol. i., p. 13.

‖ See precedents, Case 3, Chap. of Partition, vol. ii.

CHAPTER V.

OF MARRIAGE.

On the subject of marriage, it may be presumed that it has not often constituted a matter of litigation in the civil courts, from the circumstance that points connected with it do not appear to have been referred to the Hindu law-officers. Disputes connected with this topic, as well as those relating to matters of caste generally, are, for the most part, adjusted by reference to private arbitration. It is otherwise in the provinces subject to the presidencies of Madras and Bombay, where many matrimonial disagreements and questions relative to caste have been submitted to the adjudication of the established European courts.* As, however, questions relative to marriage are among those which the Company's courts are, by law, called upon to decide, it may not be amiss to cite some of the fundamental rules connected with the institution.

Marriage, among the Hindus, is not merely a civil contract, but a sacrament, forming the last of the ceremonies prescribed to the three regenerate classes, and the only one for *Sudras*,† and an unmarried man has been declared to be incapacitated for the performance of religious duties.‡ It is well known that women are betrothed at a very early period of life, and it is this betrothment, in fact, which constitutes marriage. The contract is then valid and binding to all intents and purposes. It is complete and irrevocable imme-

*See Appendix Elements Hindu Law, page 22 *et passim* and Bombay Reports, pages 11, 35, 363, 370, 379, and 389, vol. i., and pages 108, 323, 434, 473, 576, and 685, vol. ii.

†Digest, vol. iii., page 104.

‡Ibid ii. page 400.

diately on the performance of certain ceremonies,* without consummation. Second marriages, after the death of the husband first espoused, are wholly unknown to the Hindu law;† though in practice, among the inferior castes, nothing is so common. Polygamy is also legally prohibited to men, unless for some good and sufficient cause, such as is expressly declared a just ground for dissolving the former contract, as barrenness, disease, or the like. This precept, however, is not much adhered to in practice. The text of *Menu*, which in fact prohibits polygamy, has been held, according to modren practice, to justify it. "For the first marriage of the twice-born classes," says *Menu*, "a woman of the same class is recommended; but for such as are impelled by inclination to marry again, women in the direct order of the classes are to be preferred."‡ From this text it is argued by the moderns, that, as marriage with any woman of a different class is prohibited in the present age, it necessarily follows that a plurality of wives of the same class is admissible; but the inference appears by no means clear, and the practice is admitted by the *pundits* to be reprehensible; though nothing is more common, especially among the *Kooleen*, or highest caste of Brahmins.

In the event of a man forsaking his wife without just cause, and marrying another, he shall pay his first wife a sum equal to the expenses of his second marriage, provided she have not received any *stridhun*, or make it up to her, if she have; but he is not required, in any case, to assign more than a third of his property. In all cases, and for whatever cause a wife may have been deserted, she is entitled to sufficient

* Ibid, page 484; and for an account of ceremonies observed at a marriage, see As. Res., vol. vii., page 288; also Ward on the Hindus, vol. i., page 130 *et seq.*

† But a widow who, from a wish to bear children, slights her deceased husband by *marrying again*, brings disgrace on herself here below, and shall be excluded from the seat of her lord. *Menu*, cited in Dig., page 163, vol. ii.

‡ *Menu*, chap. iii., § 12.

maintenance. In the *Mitácshará*, a distinction is made. Where a second wife is married, there being a legal objection to the first, she is entitled to a sum equal to the expenses incurred in the second marriage: but where no objection whatever exists to the first wife, a third of the husband's property should be given as a compensation.* But in modern practice, a husband considers it quite sufficient to maintain a superseded wife by providing her with food and raiment.

There are eight forms of marriage: *The Brahma, Driva, Arsha, Prajapatya, Asura, Gandharva, Raeshasa* and *Paisacha.*

The four first forms are peculiar to the *Brahminical* tribe.

The principle in these contracts seems to be, that the parties are mutually consenting, and actuated by disinterested motives.

The fifth form is peculiar to *Vaishyas* and *Sudras.* It is reprobated, on the principle of its being a mercenary contract, consented to by the father of the girl for a pecuniary consideration. The sixth and seventh forms are peculiar to the military tribe, where the union is founded either on reciprocal affection or the right of conquest. And the eighth or last is reprobated for all, being accomplished by means of fraud and circumvention.†

The most usual form of marriage is that of the *Brahma,* which is completed "when the damsel is given by her father, when he has decked her, as elegantly as he can, to the bridegroom whom he has invited," the nuptials of course being celebrated with the usual ceremonies. The next species of marriage most usually practised is that of the *Asura,* where a pecuniary consideration is received by the father;

* *Yajnyawalcya,* cited in dig., vol. ii., page 420; and see a case to this effect stated, Elem, Hin. Law, App., p. 51.

† Digest, vol. ii., page 606.

and I am given to understand that marriages by the *Paisacha* mode are not uncommon; and that young women, who from their wealth or beauty may be desirable objects, are, not unfrequently, inveigled by artifice into matrimony; the forms of which once gone through, the contract is not dissoluble on any plea of fraud, or even of force.*

The *Gandharva* marriage is the only one of the eight modes for the legalizing of which no forms are necessary;† and it seems that mutual cohabitation, as it implies what the law declares to be alone necessary, namely, "reciprocal amorous agreement," would be sufficient to establish such a marriage, if corroborated by any word or deed on the part of the man.‡

The relations with whom it is prohibited to contract matrimony are thus enumerated by *Menu*: "She who is not descended from his *paternal* or *maternal* ancestors within the sixth degree, and who is not *known by her family name to be* of the same primitive stock with his father or *mother*, is eligible by a twice-born man for nuptials and holy union."

Adultery is a criminal, but not a civil offence, and an action for damages preferred by the husband will not lie against

* This is not the only instance in which fraud is legalized by the Hindu law. That law sets aside gifts or promises made for the purpose of delusion, though this is fraud on the side of the person who practises the imposition, and can entitle him to no relief. The same law allows to the creditor a lien upon a deposit or commodate in his hands for the recovery of his due from the debtor who so entrusts any article to him; and even permits the practice of trick and artifice to obtain possession of such an article with the purpose of retaining it as a pledge.—Colebrooke, Obl. and Con., Book ii., § 95, and Book iv., § 518.

† This form of marriage is declared to be peculiar to the military tribe. May not the indulgence have originated in principles similar to those by which, according both to the civil and English law, soldiers are permitted to make nuncupative wills, and to dispose of their property without those forms which the law requires in other cases?—Bl. Comm., vol. i., page 417.

‡ On this principle the law-officers of the Sudder Dewanny Adawlut declared legal a marriage contracted in Cuttack, not very long ago, in a case where the parties had cohabited for some time, and the man signified his intention by placing a garland of flowers round the neck of the woman. See also Elem. Hin Law, App., p. 198.

the adulterer.* It is not a sufficient cause for the wife to desert the husband, and there are not many predicaments in which such an act on her part is justifiable. Insanity, impotence, and degradation, are, perhaps, the only circumstances under which her desertion of her husband would not be considered as a punishable offence.† A married woman has no power to contract, and any contract entered into by her will neither be binding on herself nor on her husband, unless the subject of the contract be her own peculiar property, or unless she have been entrusted with the management of her husband's affairs, or unless the contract may have been requisite to her obtaining the necessaries of life.‡

* Colebrooke, cited Elem. Hin. Law, App., p. 33. So also our Regulations, following the Moohummudan law in this particular, treat the offence as a crime against society, and not against the individual, but they require that the husband shall stand forward to prosecute. There is a case cited by the author of the Elem. Hin. Law (App., p. 34), in which the *pundits* ruled that the adulterer was liable for the money expended by the injured husband in contracting a second marriage; but this was considered to be rather an equitable opinion than founded on any express text of law. [See S, Legal Companion, p. 47, the case of Lingee *v.* Gujjaiya, in which it was *held* that a Hindu husband can recover damages from the person who commits adultery with his wife.]

† *Menu*, cited in Dig., vol. ii., page 412.

‡ Colebrooke, Obl. and Con., Part I., Book ii., §§ 57 and 58.

CHAPTER VI

OF ADOPTION.

The etymology of the Sanscrit word for a son (*putra*) clearly evinces the necessity by which every Hindu considers himself bound to perpetuate his name. "Since the son (*trayate*) delivers his father from the hell named *put*, he was, therefore, called *putra* by Brahma himself."* Again: "A son of any description should be anxiously adopted by one who has no male issue, for the sake of the funeral cake, water, and solemn rites, and for the celebrity of his name."† Under this feeling, it was natural to resort to the expedient of adoption. Twelve sorts of sons have accordingly been enumerated by *Menu*. "The son begotten by a man himself *in lawful wedlock*; the son of his wife, begotten in the manner before described; a son given *to him*; *a son made or adopted*; a son of concealed birth, *or whose real father cannot be known*; and a son rejected by his natural parents; are the six kinsmen and heirs. The son of a young woman *unmarried*, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son by a *Sudra*, are the six kinsmen, but not heirs to *collaterals*."‡

In treating of the miscellaneous customs of Greece, the author of the Antiquities§ observes as follows:—"Adopted children were called *Paidesthetan or Eispoietoi*, and were invested in all the privileges and rights of, and obliged to

* Institutes of *Menu*, chap. ix., § 138.

† *Smriti*, quoted in the *Retnácara*: or, in the language of Statius, "*Oribitas omni fugienda nisu. Orbitas nullo tumulata fletu.*"

‡ Institutes of *Menu*, chap. ix., §§ 159 and 160.

§ Vol. ii., p. 336.

perform all the duties belonging to, such as were begotten by their fathers; and, being thus provided for in another family, they ceased to have any claim of inheritance and kindred in the family which they have left, unless they first renounced their adoption, which the laws of Solon allowed them not to do, except they had first begotten children to bear the name of the person who had adopted them, thus providing against the ruin of families, which would have been extinguished by the ruin of those who were adopted to preserve them. if the adopted person died without children, the inheritance could not be alienéd from the family into which they were adopted, but returned to the relations of the persons who had adopted them. The Athenians are by some thought to have forbidden any man to marry after he had adopted a son, without leave from the magistrate; and there is an instance in Tyszet's Chiliads of one Leogoras, who, being ill-used by Andocides, the orator, who was his adopted son, desired leave to marry. However, it is certain that some men married after they had adopted sons; and if they begot legitimate children, their estates were equally shared between those begotten and adopted."

The whole, or nearly the whole, of the provisions above cited, are strictly applicable to the system of adoption as it prevails among the Hindus at this day. But the renunciation of adoption is a thing unheard of in these provinces and unanctioned by law under any circumstances. There is no express text declaring illegal a renunciation of adoption, but at the same time there is not any which can be construed as approaching to a justification of it.

What forms at present allowed.

In the present age, two, or at the most three, forms of adoption only are allowed, in these provinces; and the *Dattaca* or son given, and the *Critrima*, or son made, are the most common. The latter form obtains only in the province of Mithilá. In strictness, perhaps, adoption in this form should

be held to be abrogated, as the filiation of any but a son legally begotten, or given in adoption, is declared obsolete in the present age;* but agreeably to a text of *Vrihaspati*, immemorial usage legalizes any practice.† Some of the requisite conditions for the adoption of a son are comprised in the following texts of *Menu*:—"He whom his father or mother,‡ with her husband's assent, gives to another as his son, provided that the donee have no issue, if the boy be of the same class, and affectionately disposed, is considered as a son given, *the gift being confirmed* by *pouring* water." *Dattaca* form of adoption,

"He is considered as a son made or *adopted* whom a man takes as his own son, the boy being equal in class, endued with filial virtues, acquainted with the merit of *performing obsequies to his adopter*, and with the sin of omitting them."§ and *Critrima* form.

But there are many conditions besides these fundamental ones: and briefly noticing such of the rules as are indisputable, and universally admitted, I shall discuss those which have admitted of doubt, and endeavour to fix such as are uncertain, by citing the authorities in support of each. Regarding this particular branch of the law, there is not much difference in the doctrine of the several schools; the *Dattacachandricá* and *Dattacamimánsá*, the two chief authorities on the subject, being respected by all. The first text above cited is sufficiently explicit as to the persons who possess the right of giving in adoption; and the only exception that has been propounded by the commentators is contained in the *Dattacamimànsá*, which refers to the gift of her son by a widow during a season of calamity; and it has been made a question of doubt, whether a widow, even with the sanction of her husband, is competent to adopt a son; but her com- A widow, is in distress, may give her son in adoption,

* See general note by Sir W. Jones, appended to his translation of *Menu's* Institutes; and the text of the *Aditya Purana*, cited in *Jagannath's* Digest, Vol. iii., page 272.

† Cited in the Digest, vol. ii., page 128.

‡ Section 4; § 12.

§ Institutes of *Menu*, chap. ix., §§ 168 and 169.

And may adopt, with sanction of her late husband.

petency so to do is established by the prevailing authorities. It has been ruled, however, that in the case of an adoption made by a widow without having obtained the consent of her husband, or in which the adopted son shall not have been delivered over to her by either of his parents, but only by his brother, the adoption is invalid.* It is required that the party adopting† should be destitute of a son, and son's son, and son's grandson; that the party adopted should neither be the only nor the eldest son,§ nor an elder relation, such

Qualifications of the adopting,

and of the adopted party.

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* Case of Taramunee Dibia *v.* Deo Narayun Rai and another, Sudder Dewanny Adawlut Reports, vol. iii., page 387. The same principle was recognized in the case of Raja Shumshere Mull *v.* Ranee Dilraj Koonwur, vol. ii., page 169.

† It has been doubted by Mr. Sutherland, in his Synopsis, whether an unmarried person, that is, one not a *grihi*, or, as we would say, bachelor, is competent to adopt; but he inclines to the affirmative of the question (p. 212). In the Precedents, vol ii., of this work, in the case of adoption No. 1, the *pundits* expressly declared the adoption by such individual to be legal and valid, and there is certainly no authority against it. The same doubt is expressed, and the same conclusion arrived at, with respect to an adoption by a blind, impotent, or lame person.

‡ *Sounaka* cited in *Datt Mim.* It has also been doubted by the author of the Considerations (p. 150), whether a man having a grandson by a daughter can adopt a son; but there is no solid foundation on which such a doubt can rest. It must have originated in the indiscriminate use of the word "grandson", in the English translations, as applicable to the daughter's son as well as to the son's son. Mr. Sutherland, in his Synopsis, page 212, infers, and justly, that if male issue exist who are disqualified by any legal impediment (such as loss of caste) from the performance of exequial rites, the affiliation of a son may legally take place. In the Summary of Hindu Law, p. 48, it is laid down as a rule, that the insanity of a begotten son would not justify adoption by the parent; but to this and other general positions laid down in that work I cannot altogether accede; for instance, it is stated, that the *Poonah Shastrees* do not recognize the necessity that adoption should precede marriage; that a younger brother may be adopted by an elder one; that the youngest son of a family cannot be adopted, &c., &c., for none of which can I find authority; though undoubtedly the whole of these positions may be just when applied to that side of India, as founded on the *lex loci*, or immemorial custom.

§ *Vasishtha*, *Datt. Nir.*, and *Menu*, ibid; but this is an injunction rather against the giving than the receiving an only or elder son in adoption, and the transfer having been once made, it cannot be annulled. This seems but reasonable, considering that the adoption having once been made, the boy *ipso facto* loses all claim to the property of his natural family. See Bombay Reports, case of Huebut Rao *v.* Govind Rao, vol. ii., page 75; also Elem. Hin. law, App., pp. 82, 83.

as the paternal or the maternal uncle;* that he should be of the same tribe as the adopting party;† that he should not be the son of one whom the adopter could not have married, such as his sister's son or daughter's son. This last rule, however, applies only to the three superior classes, and does not extend to *Sudras*.‡ It is a rule also, that when a woman adopts, she should have the consent of her husband, or, according to the law laid down in some authorities, the sanction of his kindred;§ that where there is a brother's son, he should be selected for adoption in preference to all other individuals; but this is not universally indispensable, so as to invalidate the adoption of a stranger.‖ *Dattacachandricá*, section 1, § 22. In the case of Ooman Dutt, pauper, appellant, *v.* Kunhia Singh, it was held, that while a brother's son exists, the adoption of any other individual is illegal; and this is undoubtedly consonant to the doctrine contained in the *Dattacamimánsá*, but it is controverted in the *Dattacahandricá*. It would appear, however, that, according to the law of Bengal and elsewhere, where the doctrine of the latter authority is chiefly followed, and where the doctrine of *factum valet* exists, a brother's son may be superseded in favour of a stranger; and even in Benares, and the places where the *Mimánsa* principally obtains, and where a prohibitory rule has in most instances the effect of law, so as to invalidate an act done in contravention thereto, the adoption of a brother's son or other near relative is not essential, and the validity of an adoption actually

Exception in case of *Sudras*

Widow may adopt, with sanction of kindred, according to some authorities.

A brother's son should be preferred.

But this rule does not invalidate the adoption of a stranger.

* *Dutt. Mim.*, sec. 2, § 32. Sudder Dawanny Adawlut Reports, vol. iii., p. 232. *Mit. Inh.*, chap. i., sec. 11, p. 12.

† *Menu*, chap. ix., § 168.

‡ *Narada* cited in *Dutt Nir.*

§ According to the *Vyavahárakoustabha* and *Máyuc'ha*, authorities of the highest repute among the *Mahrattas*, which in this respect follow the doctrine of the *Dattacachandricá*, the sanction of the husband is not requisite; but in this respect the authorities above cited differ from most others. Bom. Rep., vol. i., p. 181, vol. ii., pp. 76 and 456. See also Elem. Hin. Law. App. pp 66, 68, 71.

‖ Sudder Dewanny Adawlut Reports, vol. iii., p. 144.

made does not rest on the rigid observance of that rule of selection, the choice of him to be adopted being a matter of discretion.* It may be held, then, that the injunction to adopt one's own *Sapinda* (a brother's son is the first), and, failing them, to adopt out of one's own *Gotra*, is not essential, so as to invalidate the adoption in the event of departure from the rule. It is lastly requisite that the adopted son should be initiated in the name and family of the adopting party, with the prescribed form and solemnities.† The adoption being once completed, the son adopted loses all claim to the property of his natural‡ family, but he is estranged from his own family partially only. For the purposes of marriage, mourning, &c., he is not considered in the light of a stranger, and the prohibited degrees continue in full force as if he had never been removed. His own family have no claim whatever to any property to which he may have succeeded; and in the event of a son so adopted having succeeded to the property of his adopting father, and leaving no issue, his own father cannot legally claim to inherit from him, but the widow of his adopting father will succeed to the property.§ He becomes (with the exception above noticed), to all intents and purposes, a member of the family of his adopting father, and he succeeds to his

Must be initiated in the adopter's family.

Effect of adoption.

His consanguineous relatives are not his heirs.

* Colebrooke, cited in Elem. Hin. Law, App., pp. 74 and 80.

† For an enumeration of the ceremonies enjoined at an adoption, see Summary Hindu Law, p. 52, and Elements Hindu Law, p. 82 *et seq.*; but the exact observance of these ceremonies is not indispensable.—Dig., vol. iii., page 224, and Elem. Hin Law, App., pp. 101, 106.

‡ It has been asserted by the author of the Elements of Hindu Law, that a son adopted in the ordinary way, though he cannot marry among his adoptive, yet may one of his natural relations; but I cannot find any authority for this doctrine. He seems to have inferred from the text of *Parijata*, "Sons given, purchased, and the rest, who are sons of two fathers, may not marry in either family even, as was the case of Singa and Saisira," that adopted sons not bearing the double relationship might do so; but the inference is clearly untenable. Indeed, Mr. Sutherland, to whom he refers as his authority, expressly declares in his Synopsis (p. 219) that the adopted son cannot marry any kinswoman related to his father and mother, within the prohibited number of degrees, as his consanguineal relation endures.

§ Elem. Hin. Law. App. p. 101.

property, collaterally as well as lineally;* but excepting the case of the peculiar adoption termed *Dwyamushayana*, he is excluded from participating in his natural father's property.† Where a legitimate son is born subsequently to the adoption, he and the son adopted inherit together; but the adopted son takes one-third, according to the law of Bengal, and one-fourth, according to the doctrine of other schools.‡ If two legitimate sons are subsequently born, then, according to the Benares school, the property should be made into seven parts, of which the ligitimate sons would take six; and according to the law as current elsewhere, into five shares, of which the legitimate sons would take four, and so on, in the same proportion, whatever number of legitimate sons may be born subsequently.§

Exception in the case of a *Dwyamushayana*.

His share with a son subsequently born,

and with two or more.

A boy adopted by a widow with the permission of her late husband has all the rights of a posthumous son, so that a sale made by her to his prejudice of her late husband's property, even before the adoption, will not be valid, unless made under circumstances of inevitablo necessity:‖ and in the case of a Hindu of Bengal, dying in his father's lifetime without issue, but leaving a widow authorized to adopt a son, if such adoption be made by the widow, with the knowledge and consent of her deceased husband's father, at any time before he shall have made any other legal disposition of the property, or a son shall have been born to his daughter in wedlock, no such

Has all the rights of a posthumous son.

Example.

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* *Menu*, chap. ix., § 159.

† See Precedents of adoption, case 10, and of Sister's sons, &c., case 7, *Vasishtha*, cited in the *Datt. Mim.* and *Cntyáyana* in the *Dattacachandrica*.

‡ See the case of Srinath Serma *v.* Radhakaunt, and Dutt Narain Sing and others *v.* Roghoobeer Singh, S. D. A. Reports, vol. i., pp. 15 and 20.

§ It is laid down in the *Dattacachandrica*, that in case of *Sudras*, if a legitimate son be subsequently born, he is entitled to an equal share only with the adopted son; and this rule prevails accordingly in the southern provinces.

‖ Case of Ranee Kishermuneel *v.* Oodwunt Singh and another, S. D. A. Reports, vol. iii., p. 220.

subsequent disposition or birth shall invalidate the claim of the son so adopted to the inheritance.*

Dwyamusha yana form o adoption.

The above rules relate to a son adopted in the *Dattaca* form. But there is a peculiar species of adoption termed *Dwyamushayana*, where the adopted son still continues a member of his own family, and partakes of the estate both of his natural and his adopting father, and so inheriting is liable for the debts of each. To this form of adoption the prohibition as to the gift of an only son does not apply.† It may take place either by special agreement that the boy shall continue son of both fathers, when the son adopted is termed *Nitya Dwyamushayana*; or ortherwise, when the ceremony of tonsure may have been performed in his natural family, when he is designated *Anitya Dwyamushayana;* and in this latter case, the connexion between the adopting and the adopted parties endures only during the lifetime of the adopted. His children revert to their natural family.‡ With a legitimate son subsequently born, the *Dwyamushayana* takes half a share of his adopting father's property.§

Of the *Nitya* form

and *Anitya*.

His share with a son subsequently born.

Age of adoption.

The question as to the proper age for adoption has been much discussed; and the most correct opinion seems to be, that there is no defined and universally applicable rule as to the age beyond which adoption cannot take place, so long as the initiatory ceremony of tonsure, according to one opinion, and of investiture, according to another, has not been performed in the family of the natural father.

According to the *Dattacamimànsà*.

In the *Dattacamimànsà*, the period fixed beyond which adoption cannot take place is the age of five years; and if the ceremony of tonsure have been performed within that

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*Case of Ramkissen Surkeyl *v.* Srimuttee Dibia, S. D. A. Reports, 367. See also Colebrooke in Elem. Hin. Law, App., p. 102.

† See the case of Raja Shumshere Mull *v.* Rance Dilraj Koonwur; S. D. A. Reports, vol. ii., p. 169.

‡ *Datt. Mim*, sec. 6. §§ 41 and 42.
Datt. Chand, sec. 5, § 33.

period in the family of the natural father, the son adopted cannot become a *Dattaca* in the ordinary form, but must be considered an *Anitya Dwyamushayana*, or son of two fathers. This can only be effected by the performance of the sacrifice termed *Putreshti*, by which the son is affiliated in both families.

And according to the *Dattacachandrica*.

In the *Dattacachandrica** the period fixed for adoption is extended, with respect to the three superior tribes, to their investiture with the characteristic cords, which ceremony is termed *Oopunayuna*, and is subsequent to that of tonsure, or *Chooracurana*; and with respect to *Sudras*, to their contracting marriage. But investiture in the one case, and marriage in the other, must be performed in the family of the adopting father. The periods fixed, however, for the investiture of the three superior tribes are different. That of a Brahmin should take place when he is eight years of age, which may be construed optionally, as signifying eight years from the date of conception, or from the date of birth. That of a *Cshetrya* at eleven years of age, and that of a *Vaisya* at twelve. But there are secondary periods allowed: for instance, the investiture of a Brahmin may be postponed until sixteen years after the date of conception; that of a *Cshetrya* until twenty-two years after the same date; and that of a *Vaisya* until twenty-four years. It should be observed, however, that where this ceremony of *Oopunayuna* has once been performed, an insurmountable bar to adoption is thereby immediately created. Its effect cannot, as in the case of tonsure before the age of five years, according to the

Periods of investiture for the different tribes.

* The difference of opinion with respect to this point arises from a difference of grammatical construction. The term in the original is *Chundadya* (signifying tonsure and the rest), which is a compound epithet termed *Buhobrihee*, which again is divided into two kinds called *tadguna* and *atadguna*, inclusive and exclusive. According to those who adopt the former construction, adoption is lawful even after tonsure; but not so according to those who adopt the latter. The former construction is adopted by *Devandabhutta*; the latter by *Nandnpandita*.

authority of the *Dattaçamimansa*, be so far neutralized as to admit of its being re-performed after the ceremony of *Putreshti*.*

Period of adoption in Bengal and the southern provinces.

The authorities being entitled to equal weight in different parts of the country, the only ground of preference must be sought for in the different customs prevailing in different places. In the province of Bengal, and in the southern provinces, the more extended period should be assumed as the limit,† that being apparently consonant to the received practice; while in Benares, the *Dattacamimansá*, which limits the period of adoption, should, for the same reason, be followed. In laying this down as a rule, it may be objected that there do not exist sufficient grounds for the establishment of its accuracy. It is proper, therefore, that the grounds of the rule should be stated. In the precedents which I have collected, there is no case bearing directly on the point. Case 2 (which is a Bengal case) does not expressly prohibit adoption after the age of five years. And in the case of Kerutnarain *versus* Musst. Bhobinesree (the only adjudicated one for Bengal that I can find bearing on the question)‡ the principle of the extended limit was fully discussed and admitted. The limitation to the age of five years is founded on a passage in the *Calicapurana*,§ and the authenticity of that passage is doubtful. The *Dattaca-*

And in Benares.

Reason of the rule.

Precedents cited.

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* This has been doubted by the translator of the *Dattacachándrica* and *Dattacamimánsá* in his Synopsis at the conclusion of that work, p. 225; and he diffidently expresses his inability to settle the question, though he inclines to the negative: but independently of there being no authority in support of the affirmative of the question, the fact that investiture constitutes a second birth is conclusive against it. Adoption is permitted on the principle that the adopted son is born again in the family of his adopting father; but this cannot be where the investiture which causes the second birth has already been performed in the family of the natural father.

† For the doctrine as to the age of adoption according to the southern authorities, see Elem. Hin. Law, p. 75 *et seq.*, and Summary ditto, p. 50.

‡ S. D. A. Reports, vol. i., p. 161.

§ Dig., vol. iii., p. 223.

Chandricá makes no mention of it, though the *Dattacamimánsá* does. The latter being a Benares authority, it may be proper to apply the limiting principle to that province, but not to Bengal or the Dekhan, where that principle is not only not recognized, but where it is denied, and adoptions continually take place at an age far exceeding five years. There is no standard work on the subject of adoption expressly for the Bengal school; but whenever there is any difference of opinion between the *Dattacamimánsá* and the *Dattacachandrica*, the doctrine of the latter conforms to that of Bengal; for instance, as to the share to be taken by an adopted with a legitimate son.* Other instances might be cited. If it should be considered that the reasons here given are insufficient to warrant the conclusion arrived at, it may at least be contended that it is open to a Bengal *pundit* to adopt either authority, and that the adoption of that which admits the more extended limit as being the more liberal construction could not be objected to. The author of the Considerations on Hindu Law as current in Bengal† seems adverse to the extension of the limit. He maintains that in the case of Gopeemohun Deb it was the opinion of all the *pundits* who were consulted on his behalf that proof of his being under the age of five years was indispensable. He also alludes to a remark appended to the case of Kerutnarain *v.* Musst. Bhobinesree, decided in the S. D. A.; but, with respect to the first, it may be observed that there does not appear to have been any formal opinion actually taken; and, with respect to the second, it is not apparent from what authority the remark proceeded. The author of the Considerations lays it down as a second rule that adoption connot take place in any of the classes after the ceremony of tonsure shall have been performed. From what has preceded, it will appear, however, the "investiture"

The doctrine of the *Mimansá* preformes, in Benares, and that of the *Chundricá* elsewhere,

Argument continued.

Adoption cannot take place after investi-

* *Dáyabhága*, 155.
† Page 144.

ture, but may after tonsure under five years.

should have been substituted for the word "tonsure;" and that the doctrine should have been qualified by the provision that, if tonsure had been performed previously to the fifth year, it might be repeated in the family of the adopting father, the adopted son thereby becoming an *Anitya Dwyamushayana*. According to the *Máyac'ha*, an authority of the greatest eminence among the Mahrattas, the restriction as to age relates only to cases where no relationship subsists; but when a relation, or *Sagotra*, is to be adopted, no obstacle exists on account of his being of mature age, married, and having a family.* In Mithila, where the *Critrima* † form of adoption prevails, there is no sort of restriction, except as to tribe; it being requisite that the tribe of the adopting father and of the adopted son be the same. There is no limit as to age, and no condition as to the performance of ceremonies;‡ so much so, that *Keshuba Misra* in the *Dwaita Purishishta*, treating of this description of adoption, has declared that a man may adopt his own brother,§ or even his own father. But he, as well as his issue, continues after the adoption to be considered a member of his natural family,‖ and he takes the inheritance both of his own family and that of his adopting father.¶ Another peculiarity of this species of adoption is that a person adopted in this form by the widow does not thereby become the adopted son of the husband, even though the adoption should have been permitted by the husband;$

Among the Mahrattas, no restriction as to age of a relation.

Nor in the *Critrima* form.

According to which form a brother or a father may be adopted: and a *Critrima* does not lose relation to his natural family, but inherits in both.

Adopted by a widow, does not thereby become son of the husband.

* Bombay Reports, vol, i., p. 195.

† This form of adoption is wholly unknown in Bengal; but see notes. Sutherland's Synop., p. 221, and case of Ooman Dut *v.* Kunhai Singh, S. D. A. Reports, vol. iii., p. 114.

‡ See the case of Kullean Singh *v.* Kirpa and another, S. D. A. Reports, vol. i., p. 9.

§ The reverse of this opinion was maintained in the case of Baboo Runjeet Singh *v.* Obhye Narain Singh, S. D. A. Reports, vol. ii., p. 245; but the authorities cited by the law-officers in support of the doctrine laid down by them on that occasion had relation to the Dattaca form of adoption.

‖ Dig., vol. iii., p. 276.

¶ S. D. A. Reports, vol iii., p. 307,

$ Ibid, vol. ii., p. 27,

and the express consent of the person nominated for the adoption must be obtained during the lifetime of the adopting party.* This relation of *Critrima* son extends, as has been already observed, to the contracting parties only; and the son so adopted will not be considered the grandson of the adopting father's father, nor will the son of the adopted be considered the grandson of his adopting father. He does not inherit collaterally, being ninth in the enumeration, according to *Yàjnyawalcya*.†

and must himself consent to the adoption.

The relation does not descend.

Does not inherit collatorally.

It has already been observed that a man who has a son, son's son, or son's grandson, is not competent to adopt a son; and it would seem to follow, by analogy, that if a man has a son, and the son of an elder son deceased, he may give the former‡ away in adoption, because he cannot be considered as the father of one son only; the latter also bearing towards him the relation of a son to all intents and purposes, and supplying the place of the elder one. In the *Dattaca-mimànsà*, there is a prohibition against the gift of a son, where there are only two; but the precept is merely dissuasive, and not peremptory.

A man having a son, and a son's son may give the former in adoption.

Two persons cannot join in the adoption of one son. A notion seems to have prevailed, that tow brothers might adopt the same individual; but this is entirely erroneous.§ The supposition seems to have proceeded on a misconstruction of the following text of *Menu*:—"If, among several brothers of the whole blood, one have a son born, *Menu* pronounces them all fathers of a male child by means of that son."‖ But that text is not meant to authorize the adoption of a nephew even, by two or more brothers. The adopted son of one brother would, of course, offer up oblations to the

Two persons cannot adopt the same individual under any circumstances.

* S. D. A. Reports, vol. ii,, p. 173.
† Dig., vol. iii., p. 276.
‡ In this case the dissuasive precept against giving one of two sons would apply, but the adoption would nevertheless be valid.
§ See Considerations on Hindu law, p. 473 *et seq.*
‖ Cited in Dig., vol. iii., p. 226.

ancestors of all, and so far would perform the office of a son to them also; but he would not take the estate of his adopting father's brothers, in the event of their having any nearer heir.

Another point which has been the subject of much discussion is, as to whether an adopted son by the *Dattaca* form succeeds collaterally, as well as lineally; but this may now be fairly said to be set at rest, and decided in the affirmative. It is true that *Jimutavahana*, in the *Dáyabhàga*, has contended that the son adopted in the *Dattaca* form cannot succeed to the property of his adopting father's relations; but the doctrine, being in opposition to the text of *Menu*, cannot be held entitled to any weight.* It should be observed, however, that a son so adopted has no legal claim to the property of a *Bandhu* or cognate relation; for instance, if a woman, on whom her father's estate had devolved, adopt a son with the permission of her husband, the son so adopted will not be entitled to such estate on his adopting mother's death. It will go to her father's brother's son, in default of nearer heirs. This point was determined in a case recently decided by the Court of Sadder Dewanny Adawlut. † It is not quite evident why a daughter's adopted son should be excluded from inheriting the estate of his adopting mother's father, while a son's adopted son's right of succeeding collaterally has been acknowledged, inasmuch as the maternal grandfather is enumerated among the kindred by all the Hindu legislators; but the reason is, that the party adopted in the latter case becomes the son of a person whose lineage is distinct from that of the maternal grandfater.

A *Dattaca* son succeeds collaterally, but not to the property of cognates.

Example.

Reason for his not succeeding to cognate's property.

* This question has been amply discussed in the Considerations on Hindu Law, p. 128 *et seq.* See also case of Shamchunder and Roodercbunder v. Narayinee Dibia and Ramkishen Rai, S. D. A. Reports, vol. i., p. 209.

† See the case of Gunga Mya v. Kishen Kishore and others, S. D. A. Reports, vol, iii. p. 128.

Reason of the difference of opinion as to the *Dattaca*'s right of collateral succession.

The difference of opinion existing as to whether a *Dattaca* should be considered as heir of the adopter's kinsmen or not, arises from a difference in the order of enumeration in the twelve descriptions of sons; some legislators maintaining that *Menu* included in the *Dattaca* among the first six who are entitled to inherit collaterally, while others maintain that the same law-giver ranked him among the last six, who can only inherit lineally. In the *Dwaita Nirnaya* the several opinions have been noticed, and the author of that work gives his own in favour of the *Dattaca*. In Sir William Jones's translation of the Institutes of *Menu*, the *Dattaca* in ranked among the first six; and a great majority of the *pundits* throughout the country, who were consulted on the subject when it was agitated in the Supreme Court, expressed their opinion that the *Dattaca* is entitled to inherit collaterally.*—The author of the *Dattacachandrica*, according to his usual expedient of reconciling conflicting doctrines, puts the decision of the question on the character of the claimant—a criterion, it must be confessed, not very precise.

Authorities cited.

It is clear that a man having adopted a boy, and that boy being alive, he cannot adopt another. It is written in the *Dattacamimánsá*: "A man destitute of a son (*aputra*) is one to whom no son has been born, or whose son has died: for a *text of Sounaka* express, "one to whom no son has been born, or whose son has died, having fasted for a son, &c.; †

* This question was circulated by the Court of Sudder Dewanny Adawlut to all the Courts under its jurisdiction to ascertain the law on the point from their Hindu law-officers. See p. 191, Considerations on Hindu Law.

† Page 2.—There is a *vyavastha* maintaining the opposite doctrine, the authority cited for which is a verse ascribed to *Menu*, though not to be found in the Institutes: "Many sons are to be desired, that some one of them may travel to Gya." But this text obviously relates to legitimate sons. See the case of Goureepershad Rai *v.* Musst. Jymala, p. 136, vol. i., S. D. A. Reports. And Mr. Colebrooke observes, in a note to p. 42. ibid, that the validity of a second adoption, while another son, whether by birth or adoption, is living, is a question on which writers of eminence have disagreed; that *Jagannátha*, in his Digest, inclines to hold it valid; but that the author of the *Dattacamimansa*, a work of great authority, maintains the contrary opinion.

A man having a son or an adopted son, may authorize his wife to adopt another, failing such son.

but it seems to be admitted that a man having a legitimate son may not only authorize his wife to adopt a son after his death, failing such legitimate son, but also, failing the son so adopted, to adopt another in his stead ;* and it has also been ruled that authority to a wife to adopt, in the event of a disagreement between her and a son of the husband, then living, will not avail; though authority to adopt, in the event of that son's death, would be valid.† It is a disputed point, whether a widow having, with the sanction of her husband, adopted one son, and such son dying, she is at liberty to adopt another without having received conditional permission to that effect from her husband. According to the doctrine of the *Dattacamimànsa*, the act would clearly be illegal; but *Jagannàtha* holds the second adoption in such case would be valid, the object of the first having been defeated. According to the authorities which are followed in Bengal and Benares, a woman is competent, after the death of her husband, to adopt a son, provided he gave her permission to do so during his lifetime; and, according to the law of the western provinces, with the sanction of the husband's kindred, after his death; these authorities contending, that although a woman cannot of herself perform the ceremonies requisite to adoption, yet that there is no objection to her calling in the assistance of learned Brahmins, as is practised by *Sudras* on similar occasions. But according to the doctrine of *Vachespati*, whose authority is recognized in Mithila, a woman cannot, even with the previously obtained sanction of her husband, adopt a son after his death, in the *Dattaca* form; and to this prhibitory rule

But whether she can without such sanction, is disputed.

Doctrine of *Jagnannatha*.

Of Bengal.

And Benares.

And western provinces.

Reason of the doctrine.

Doctrine of the Mithila school.

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* Case of Shamchunder and Rooderchunder, p. 209, vol. i., S. D. A. Reports, where it was established that there may be two successive adoptions by the widows of the same man; and the case of Musst. Solukhna *v.* Ramdolal Pande and others, p. 334, vol. i.

† Case of Musst. Solukhna *v.* Randolal Pande and others, vol. i. p. 325.

may be traced the origin of the practice of adopting in the *Critrima* form, which is there prevalent. This form requires no ceremony to complete it, and is instantaneously perfected by the offer of the adopting, and the consent of the adopted, party. It is natural for every man to expect an heir, so long as he has life and health; and hence it is usual for persons, when attacked by illness, and not before, to give authority to their wives to adopt. But in Mithilá, where this authority would be unavailable, the adoption is performed by the husband himself; and recourse is naturally had to that form of adoption which is most easy of performance, and therefore less likely to be frustrated by the impending dissolution of the party desirous of adopting.

Of the *Critrima* form.

Reason of its prevalence in Mithilá.

It is an universal rule in Bengal and Benares that a woman can neither adopt a son, nor give away her son in adoption, without the sanction of her husband previouly obtained; but it does not appear that the prohibition in Mithilá, which prevails against her receiving a son in adoption according to the *Dattaca* form, even with the previous sanction of her husband, he being dead, extends to her receiving a boy in adoption according to the *Critrima* form; and the son so adopted will perform her obsequies, and succeed to her peculiar property, though not to that of her deceased husband.* It is not uncommon in the province of Mithilá for the husband to adopt one *Critrima* son, and the wife another.

Sanction of the husband not requisite in this form of adoption.

The husband may have one *Critrima* son, and the wife another.

I have laid it down as a rule that in the present age adoption is allowable only in the *Dattaca Dwyamushyana*, and *Critrima* forms; but I find, on reference to the Elements of Hindu Law, that a question was agitated as to the admissibility of the *Crita*, or son bought. The point was much canvassed, and gave rise to a protracted contro-

Of the *Crita* son.

*Suth. Synopsis, note 5, p. 222.

versy between two of the most eminent scholars of the day;* and there is a case in the Sudder Dewanny Adawlut Reports,† in which the claimant was alleged to be of the *Paunerbhava* class,‡ and in which, in all probability, the claim would have been adjudged, had it been proved to be customary for sons of that description to succeed. Although, therefore, it may be asserted that, generally speaking, there are only three species of adoption allowable in the present age, yet the rule should be qualified, by admitting an exception in favour of any particular usage which may be proved to have had immemorial existence. Thus, it appears that the *Goswamis* and other devotees who lead a life of celibacy buy children to adopt them in the form termed *Crita*, or son bought; and that the practice of appointing brothers to raise up male issue to deceased, impotent, or even absent husbands, still prevails in Orissa.§ The son so produced is termed *Cshetraja*, or son of the wife; and doubtless these several sorts of subsidiary sons should be held entitled to the patrimony of their adopting fathers, in places where the *lex loci* would justify the affiliation.‖ In former times it was the practice to affiliate daughters in default of male issue, but the practice is now forbidden¶ The other forms of adoption enumerated by *Menu*** appear to be wholly obsolete in the present age. Any discussion, therefore, of their relative merits would be foreign to the purpose of this publication.

Of the *Pounerbhava.*

The *Goswamis* adopt in the *Crita* form.

Of the *Cshetraja.*

Other forms obsolete.

*See Elem. Hin. Law, App., p. 107 *et seq.*
†Vol i., p. 28.
‡See *Mitac.*, chap. i., sec. 2, § 8.
§ Note to Dig., vol. iii., p. 267.
‖See note, S. D. A. Reports, vol. ii. p. 175.
¶*Jimutavahana*, cited in Dig., vol. iii., p. 493.
**Institutes, chap. iv., §§ 159 and 160.

CHAPTER VII.

OF MINORITY.

Age of minority.

Agreeably to the Hindu law, as current in the Benares and Mithilá schools, minority is held to last until after the expiration of sixteen years of age;* and according to the doctrine of Bengal, the end of fifteen years is the limit of minority.†

Of guardians

Of the father's guardianship.

Of the mother's.

Of the paternal relations.

And of the maternal. Their appointment vested in the ruling power.

A father is recognized as the legal guardian of his children, where he exists; and where the father is dead, the mother may assume the guardianship;‡ but where the duties of manager and guardian are united, she is, in the exercise of the former capacity, necessarily subject to the control of her husband's relations; and with respect to the minor's person likewise, there are some acts to which she is incompetent, such as the performance of the several initiatory rites, the management of which rests with the paternal kindred. In default of her, an elder brother of a minor is competent to assume the guardianship of him. In default of such brother, the paternal relations generally are entitled to hold the office of guardian; and, failing such relatives, the office devolves on the maternal kinsmen, according to their degree of proximity, but the appointment of guardians universally rests with the ruling power.§

* "Until the minors arrive at years of discretion:" in the sense of restriction, before they attain their seventeeth year.—The *Retnacara.* See Dig., vol. iv., p. 243. According to Colebrooke, sixteen years must be completed.—Elem. Hin. Law, Adp., p. 208.

† See Annotations on the *Dàyabhàga*, p. 58; and Dig., vol. i. p. 300.

‡ And this has been held to include the stepmother, whose right of guardianship was declared to be superior to that of the minor's paternal uncle.—Bombay Reports, vol. ii., p. 144.

§ Dig., vol. iii., p. 544, and Elem. Hin. Law. App., p. 202.

Guardianship of a female,

The guardianship of a female (whether she be a minor or adult) until she be disposed of in marriage rests with her father; if he be dead, with her nearest paternal relations.* After her marriage, a woman is subjected to the control of her husband's family. In the first instance, her husband is her guardian; in default of him, her sons, grandsons, and great-grandsons are competent to assume the guardianship; and, in default of them, her husband's heirs generally, or those who are entitled to inherit his estate after her death, are competent to exercise the duties of guardian over herself and her property. On failure of her husband's heirs, her paternal relations are her guardians; and, failing them, her maternal kindred. In point of fact, females are kept in a continual state of pupilage.

during coverture.

and in widowhood.

The ruling power is the supreme guardian of all minors.

The ruling power is in every instance, whether the natural and legal guardians be living or dead, recognized to be the legitimate and supreme guardian of the property of all minors, whether male or female;† and it may here be mentioned that, agreeably to the regulations of Government, the state of minority is held to extend to the end of the eighteenth year.‡

Power of guardians over the property of their wards.

As to the power of guardians over the property of their wards, I apprehend that much misconception exists. As I understand the provisions on the subject, "minors are, under the protection of the law, favoured in all things which are for their benefit, and not prejudiced by any thing to their disadvantage."§ It has been laid down by Sir William Jones

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* See Elem. Hin. Law, App., pp. 22 and 204.

† Thus the property of a woman, and the goods of a minor, falling into the king's power, should not be taken by him as owner: this has been already noticed. But it may be here remarked that the property of a minor should be entrusted to heirs, and the rest *appointed* with his concurrence, or, if the infant be absolutely incapable of discretion, with the consent of a near and unimpeachable friend, such as his mother and the rest." See Dig., vol. iv., p. 243.

‡ Section 2, Regulation XXVI., 1793.

§ Colebrooke on Obligations and Contracts, chap. x., § 585.

that "assets may be followed in the hands of any representative."* This is doubtless true, but a latitude has been given to the rule which the terms of it do not warrant. It has been held, I believe, that, for this purpose, a guardian may be considered as the representative of the deceased; whereas it is obvious that, *quoad hoc*, he is only the representative of his successor. I understand the expression to mean that whoever takes the assets, whether near or remote in the order of inheritance, is liable for the debts of the deceased, so far as those assets go, provided such heir have attained the age of majority; and that, where the heir is a minor, the creditor must wait until the minority expires before he can come upon the assets for the liquidation of his debts. Subject to this condition, the son must pay his father's debts, as well as all necessary debts contracted on his account during his minority. And according to the Benares school, the debts of the father are binding on the son,† whether the former left property or not, as well as those of the grandfather; but he need not pay interest on the latter.

The following case arose but very lately in the Court of Sudder Dewanny Adawlut. A, a Hindu *zemindar* of Bengal, executed a deed of sale for a portion of his estate to B; B executing a separate engagement that the sale should be redeemable by re-payment of the money with interest within the term of a year. Before the term expired, the *zemindar* A died, leaving a widow and an adopted minor son, or rather a son adopted by authority, after his death, by the widow.

* See note to Colebrooke's Translation of *Jagannàtha's* Digest, vol. i. p. 266.

† But the obligation is considered only as a moral, and not a legal one, provided there are no assets. See Colebrooke, cited in App. Elem. Hin. Law, p. 347; but the same high authority has laid down as a principle, in his Treatise on Obligations and Contracts (chap. ii., § 51), that heirs succeed to the obligations of ancestors without any reference to the adequacy of the property, and the rights of inheritance must be relinquished, when its obligations are repudiated. And see Elem. Hin. Law, App., pp. 464 and 465.

Within a few days of the completion of the term when the sale would have become absolute and irrevocable, the widow, as guardian of the minor, borrowed money elsewhere of C, with which she paid the debt of B, and freed the land, executing to the lender a similar second sale of the same land, redeemable within a given term; which term, however, expired without re-payment on her part. The question then here was; First, Could any rule of Hindu law prevent the land from becoming the property of B, on the term of the first sale expiring without re-payment? Secondly, If there be no such rule, and the widow saved the land for a time by the second conditional sale, was it not a case of necessity, such as to justify her act in behalf of her ward, as clearly beneficial to him? Thirdly, if a father sell a portion of his land, with a condition for redemption, and his heir (a minor), or his guardian on his part, do not redeem, is not such land gone irrevocably? And fourthly, Do the debts of a father become payable out of his assets, even in the hands of his heir (who is a minor), on demand from the guardian? The substance of the reply of the Hindu law-officers consulted on this occasion was, that no necessity for the sale had been made out, inasmuch as the estate of the deceased could not have been legally alienable for his ancestor's debts until after the minor had attained majority. Judgment was, however given for the purchaser: and the following arguments were used on the occasion: That supposing the ancestor's conditional sale to have remained unredeemed after the expiration of the period stipulated, and the usual term of notice, the land would, of necessity, have fallen to the former creditor: That it was mere folly to urge that the act of the mother in saving it for a time, and obtaining a further period, was not be held good as an act evidently for the benefit of the minor, inasmuch as, but for her renewal by a fresh loan in her capacity of guardian, the conditional sale must undoubtedly have become absolute to the creditor: That

Question as to the liability of a minor and of his estate during his minority.

according to the invariable parctice of the courts, no plea of minority could be listened to, or any other doctrine recognized than that the estate of a Hindu of Bengal becomes liable at his death for the satisfaction of his just debts, especially where he has pledged his land as security for those debts, and that his power of selling outright, or conditionally, any part of or all his landed property, could not be questioned: That any other doctrine would involve in confusion the acts of the court for many years past, as there was scarcely a contract of conditional sale in the provinces where that form of contract prevails, in which some out of the numerous co-sharers were not minors when the sale became absolute; and that, if their minority, in such cases, must be considered a bar to foreclosure, and cause the transaction to run on fifteen years longer, there would probably be an end to such transactions altogether, and it would not be possible to raise money at all, or at least not except on harder terms than at present: That the doctrine maintained by the court appeared to be supported by the opinion of the commentator *Jagannàtha*,* and that though there should prove to be conflicting opinions as to the law, the established usge and practice ought to prevail: And, in short, that whatever might be the real doctrine of the Hindu law on the subject, the court was bound to follow that law in matters of inheritance, marriage, caste, and religious usages only, and not in matters of contract, of which nature the case in question appeared to be.

In answer to the above arguments, it may be observed that, supposing the minor's estate not to be liable, there did not exist any necessity for the widow's making a conditional sale. It may be assumed, too, that, according to our own regulations, a mortgage would not be foreclosed against a minor, and that he would be allowed his equity of redemp-

*See Dig., vol. i., chap. 5, on payment of debts and particularly text 172, as translated by Mr. Colebrooke.

tion on coming of age. It did not, therefore, signify whether the term of the mortgage was near expiring or not. It was at the lender's own risk to take a mortgage, in which the borrower's interest might expire before the expiration of the term.

I shall not, however, enter into any question as to the expediency or otherwise of the doctrine established in this instance, but content myself with a brief inquiry as to the law of the case, which appears quite clear, when disencumbered of the commentary of *Jagannátha*, whose authority cannot be held to be oracular or incontrovertible in any instance, especially where it is opposed by texts of unquestioned weight and indubitable import. The first text at all to the point is that of *Yájnyawalcya* (191). It has thus been translated by Mr. Colebrooke, with a view to adopt it to the subsequent commentary of *Jagannátha*: "He who has received the estate of a proprietor, leaving no son *capable of business*, must pay the debts *of the estate*, or, on failure of him, the person who takes the wife of the deceased; but not the son whose father's assets are held by another." Now, here it must be observed that the word in *italics* are not in the original, and that the expression "capable of business" is clearly an interpolation of the commentator, The original is *rikthagrahee*, or taker of the property. In the concluding part of the text it is distinctly stated that the son whose father's assets are held by another must not pay the debts. The next text is that of *Náreda* (172), which, agreeably to *Jagannátha's* comment, has been thus translated by Mr. Colebrooke: "Of the successor to the estate, the guardian of the widow and the son *not competent to the management of the affairs*, he who takes the assets becomes liable for the debts: the son, *though incompetent*, must pay the debt, if there be no guardian of the widow, nor a successor of the estste; and the person who took the widow, if there be no successor to the estate, nor competent son."

Authorities on the subject cited.

Here the original does not mean a son incompetent from minority to manage his affairs, but a son incompetent to inherit by reason of some natural disqualification, such as blindness, disease, or the like. A son, even though incompetent to inherit, in the same manner as a son who does not inherit assets, is morally bound to pay his father's debts; and the object of the above text is to show the obligation under which he lies, if there be no successor to the estate, nor guardian of the widow. There is nothing whatever, in any text that I have been able to discover, relative to the payment of debts by a guardian. Lastly come the two texts of *Catyáyana* and *Náreda* (187 and 188): "On the death of a father, *his debt* shall in no case be paid by his sons, incapable from non-age of conducting their own affairs; but at their full age *of fifteen years*, they shall pay it in proportion to their shares, otherwise they shall dwell hereafter in a region of horror." "Even though he be independent, a son incapable from non-age of conducting his affairs is not *immediately* liable for debts." It will be observed that *Jagannátha*, in commenting on these passages, attempts to make a distinction between minority and infancy, and infers that it is only during the latter state that a son is exempted from liability for his father's debts; but the text in the original is *apráptavyaváhara*, which clearly means one who has not attained the age prescribed for the management of affairs. It follows that where, owing to a son's minority, the father's assets are taken in charge by another person, such person cannot legally apply any portion of the assets to the payment of the father's debts; and that it is only where a person succeeds to property in his own right, that he is at liberty to pay the debts of the ancestor by means of such property. A guardian may, indeed, dispose of a portion to meet a necessity arising for the minor's subsistence; but no necessity can by possibility arise for disposing of any portion to pay the minor's father's debts, for he must cease to be a minor

Conclusion, that the minor heir and his estate are not liable for the debt of his ancestor, until his majority.

before he can be liable. Nor does there appear to be much of hardship in this rule. The provisions of the English law savour of much more hardship; for, according to it, real estates are not subject at all to the payment of debts by simple contract, unless made so by will. All immoveable property, in the Hindu law, is subject to a kind of entail; so much so, that the right of the son is equal to that of the father, supposing the property to be ancestral; and it would be hard enough, under such circumstances, that the imprudence of the father should ruin the son; for, as it is, he is bound, both legally and morally, to pay the debts; and it may be, perhaps, but just that the period for exacting payment should be postponed until he comes to years of discretion sufficient to enable him to realize the means of satisfying the creditors with the least detriment to himself. The assets cannot in the meantime be alienated by the minor, and the creditor is ultimately sure, where assets exist, of receiving the amount of his demand with interest. Especially in a case of mortgage, where the produce of the property or the usufruct might be awarded to the creditor in lieu of interest, which arrangement could not operate prejudicially to either party, or involve any breach of the Hindu law, for the usufruct of property is one species of legal interest which is called *bhogalábhá*, or interest by enjoyment. The *pundits* being called upon to expound the law in a case involving a similar question* which was recently decided at Bombay they declared that a woman who had succeeded, as heir-at-law, to property left by her own father, cannot dispose of that property in liquidation of the debts of her husband, unless her son, having already attained the age of sixteen years, or age of discretion, shall consent to the act. This, it will be observed, is a stronger case than the one above alluded to, because a son is bound to pay the debts of his father,

Cases cited in confirmation of the above opinion.

* Bombay Reports, vol. i., p. 176.

whether he inherits assets, or not; and by this decision it was determined that property to which he had a claim in expectancy only, could not be alienated for that purpose, until he attain the age of majority; and it was ruled also, in a case decided under the Madras Presidency, that the father being dead, his son is not liable for his debts until after he has attained the age of seventeen.*

* Elem. Hin. Law, App., p. 206.

Appendix.

ACTS.

ACT VI OF 1871.

THE BENGAL CIVIL COURTS' ACT,* 1871.

S. 24. Where, in any suit or proceeding, it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage, or caste, or any religious usage or institution, the Muhammadan law in cases where the parties are Muhammadan, and the Hindu law in cases where the parties are Hindus, shall form the rule of decision except in so far as such law has, by legislative enactment, been altered or abolished.

Certain decisions to be according to native law.

In cases not provided for by the former part of this section, or by any other law for the time being in force, the Court shall act according to justice, equity, and good conscience.

ACT XXI. OF 1850.

FREEDOM OF RELIGION.

An Act for extending the principle of section 9, Regulation VII. 1832, of the Bengal Code throughout the Territories subject to the Government of the East India Company.†

WHEREAS it is enacted by section 9, Regulation VII. 1832, of the Bengal Code, that "whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Muhammadan persuasion, or where one or more of the parties to the

Preamble.

* This Act is in force in Bengal and the N. W. Provinces only.

† Declared to apply to the whole of British India, except the Scheduled Districts, Act No. XV. of 1874.

to the suit shall not be either of the Muhammadan or Hindu persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled;" and whereas it will be beneficial to extend the principle of that enactment throughout the territories subject to the government of the East India Company; It is enacted as follows :—

Law or usage which inflicts forfeiture of, or affects, rights on change of religion or loss of caste to cease to be enforced.

1. So much of any law or usage now in force within the territories subject to the government of the East India Company, as inflicts on any person forfeiture of rights of property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste,"* shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories.†

ACT XV. OF 1856.

RECEIVED THE GOVERNOR-GENERAL'S ASSENT ON THE 25TH JULY 1856.

An Act to remove all legal obstacles to the marriage of Hindu Widows.‡

Preamble.

WHEREAS it is known that, by the law as administered in the Civil Courts established in the territories in the possession and under the government of the East India Company, Hindu widows, with certain exceptions, are held to be, by reason of their having been once married, incapable of contracting a second valid marriage, and the offspring of such

* 13 Beng. 25, 75—76

† 9 Moo. I. A. 230.

‡ Declared to apply to the whole of British India, except the Scheduled Districts. Act No. XV. of 1874. As to the effect of unchastity in the case of a widow who has once inherited, see 13 Beng. 1.

widows by any second marriage are held to be illegitimate and incapable of inheriting property; and whereas many Hindus believe that this imputed legal incapacity, although it is in accordance with established custom, is not in accordance with a true interpretation of the precepts of their religion, and desire that the civil law administered by the Courts of Justice shall no longer prevent those Hindus who may be so minded from adopting a different custom, in accordance with the dictates of their own consciences; and whereas it is just to relieve all such Hindus from this legal incapacity of which they complain; and the removal of all legal obstacles to the marriage of Hindu widows will tend to the promotion of good morals and to the public welfare; It is enacted as follows:—

Marriage of Hindu widows legalized.

1. No marriage contracted between Hindus shall be invalid, and the issue of no such marriage shall be illegitimate, by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindu law to the contrary notwithstanding.

Rights of widow in deceased husband's property to cease on her re-marriage.

2. All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to re-marry, only a limited interest in such property, with no power of alienating the same, shall, upon her re-marriage, cease and determine as if she had then died;* and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same.

Guardianship of children of

3. On the re-marriage of a Hindu widow, if neither the widow nor any other person has been expressly constituted

* *Párvati* v. *Bhikú*, 4 Bomb. A. C. J. 25. *Akora Suth* v. *Borcani* 2 Beng. 198.

deceased husband on the remarriage of his widow.

by the will or testamentary disposition of the deceased husband, the guardian of his children, the father or paternal grandfather, or the mother or paternal grandmother, of the deceased husband or any male relative of the deceased husband, may petition the highest Court having original jurisdiction in civil cases in the place where the deceased husband was domiciled at the time of his death, for the appointment of some proper person to be guardian of the said children, and thereupon it shall be lawful for the said Court, if it shall think fit, to appoint such guardian, who, when appointed, shall be entitled to have the care and custody of the said children, or of any of them, during their minority, in the place of their mother; and in making such appointment the Court shall be guided, so far as may be, by the laws and rules in force touching the gurardianship of children who have neither father nor mother.

Provided that, when the said children have not property of their own sufficient for their support and proper education whilst minors, no such appointment shall be made otherwise than with the consent of the mother, unless the proposed guardian shall have given security for the support and proper education of the children whilst minors.

Nothing in this Act to render any childless widow capable of inheriting.

4. Nothing in this Act contained shall be construed to render any widow, who, at the time of the death of any person leaving any property, is a childless widow, capable of inheriting the whole or any share of such property, if, before the passing of this Act, she would have been incapable of inheriting the same by reason of her being a childless widow.

Saving of rights of widow marrying, except as provided in ss. 2, 3, 4.

5. Except as in the three preceding sections is provided, a widow shall not, by reason of her remarriage, forfeit any property, or any right to which she would otherwise be entitled; and every widow who has remarried shall have

the same rights of inheritance as she would have had, had such marriage been her first marriage.

Ceremonies constituting valid marriage to have same effect on widow's marriage.

6. Whatever words spoken, ceremonies performed, or engagements made, on the marriage of a Hindu female who has not been previously married, are sufficient to constitute a valid marriage, shall have the same effect, if spoken, performed, or made on the marriage of a Hindu widow; and no marriage shall be declared invalid on the ground that such words, ceremonies, or engagements are inapplicable to the case of a widow.

Consent to re-marriage of minor widow.

7. If the widow re-marrying is a minor whose marriage has not been consummated, she shall not re-marry without the consent of her father, or, if she has no father, of her paternal grandfather, or, if she has no such grandfather, of her mother, or, failing all these, of her elder brother, or, failing also brothers, of her next male relative.

Punishment for abetting marriage made contrary to this section.

All persons knowingly abetting a marriage made contrary to the provisions of this section shall be liable to imprisonment for any term not exceeding one year, or to fine, or to both.

Effect of such marriage. Proviso,

And all marriages made contrary to the provisions of this section may be declared void by a Court of law. Provided that, in any question regarding the validity of a marriage made contrary to the provisions of this section, such consent as is aforesaid shall be presumed until the contrary is proved, and that no such marriage shall be declared void after it has been consummated.

Consent to re-marriage of major widow.

In the case of a widow who is of full age, whose marriage has been consummated, her own consent shall be sufficient consent to constitute her re- marriage lawful and valid.

THE HINDU WILLS' ACT,

No. XXI. OF 1870.

An Act to regulate the Wills of Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal and in the Towns of Madras and Bombay.

Preamble.

WHEREAS it is expedient to provide rules for the execution, attestation, revocation, revival, interpretation, and probate of the wills of Hindus, Jainas, Sikhs, and Buddhists in the territories subject to the Lieutenant-Governor of Bengal and in the towns of Madras and Bombay; It is hereby enacted as follows:—

Short title

1. This Act may be called "The Hindu Wills' Act, 1870;"

Certain portions of Act X. of 1865 extended to wills of Hindus, Jainas, Sikhs, and Buddhists.

2. The following portions of the Indian Succession Act, 1865, namely,—

sections 46, 48, 49, 50, 51, 55, and 57 to 77 (both inclusive),

sections 82, 83, 85, 88 to 103 (both inclusive),

sections 106 to 177 (both inclusive),

sections 179 to 189 (both inclusive),

sections 191 to 199 (both inclusive),

so much of Parts XXX, and XXXI, as relates to grants of probate* and letters of administration with the will annexed, and

Parts XXXIII. to XL. (both inclusive), so far as they relate to an executor and an administrator with the will annexed,

shall, notwithstanding anything contained in section 331 of the said Act, apply—

Extent of Act.

(*a*) to all wills and codicils made by any Hindu, Jaina, Sikh, or Buddhist, on or after the first day of September one thousand eight hundred and seventy, within the said terri-

* This makes "the probate evidence against all persons, executor or others, interested under the will," 8 Beng. 208, 220.

tories, or the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(*b*) to all such wills and codicils made outside those territories and limits, so far as relates to immoveable property situated within those territories or limits:

3. Provided that marriage shall not revoke any such will or codicil:

Provisos.

And that nothing herein contained shall authorize a testator to bequeath property which he could not have alienated *inter vivos*, or to deprive any person of any right of maintenance of which but for section 2 of this Act, he could not deprive them by will;

And that nothing herein contained shall vest in the executor or administrator with the will annexed of a deceased person any property which such person could not have alienated *inter vivos*:

And that nothing herein contained shall affect any law of adoption or intestate succession:

And that nothing herein contained shall authorize any Hindu, Jaina, Sikh, or Buddhist to create in property any interest which he could not have created before the first day of September one thousand eight hundred and seventy.

Partial repeal of Bengal Regulation V. of 1799, section 2.

4. On and from that day, section 2 of Bengal Regulation V. of 1799 shall be repealed so far as relates to the executors of persons who are not Muhammadans, but are subject to the jurisdiction of a District Court in the territories subject to the Lieutenant-Governor of Bengal.

Saving of rights of Administrator-General.

5. Nothing contained in this Act shall affect the rights, duties, and privileges of the Administrators-General of Bengal, Madras, and Bombay, respectively.*

* See Act II. of 1874.

Interpretation-clause.

6. In this Act and in the said sections and Parts of the Indian Succession Act, all words defined in section 3 of the same Act shall, unless there be something repugnant in the subject or context, be deemed to have the same meaning as the said section 3 has attached to such words respectively:

And in applying sections 62, 63, 92, 96, 98, 99, 100, 101, 102, 103, and 182 of the said Succession Act, to wills and codicils made under this Act, the words, "son," "sons," "child," and "children," shall be deemed to include an adopted child; and the word "grandchildren" shall be deemed to include the children, whether adopted or natural-born, of a child, whether adopted or natural-born; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son:

And in making grants, under this Act, of letters of administration with the will annexed, or with a copy of the will annexed, section 195 of the said Succession Act shall be construed as if the words, "and in case the Hindu Wills' Act had not been passed," were added thereto; and section 198 of the said Succession Act shall be construed as if, after the word "intestate," the words, "and the Hindu Wills' Act had not been passed," were inserted; and sections 230 and 231 of the said Succession Act shall be construed as if the words, "if the Hindu Wills' Act had not been passed," were added thereto, respectively.

ACT III OF 1872.

RECEIVED THE GOVERNOR-GENERAL'S ASSENT

ON THE 22ND MARCH 1872.

Preamble.

An Act to provide a form of Marriage in certain cases.

WHEREAS it is expedient to provide a form of marriage for persons who do not profess the Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh, or Jaina religion, and

to legalize certain marriages the validity of which is doubtful; It is hereby enacted as follows:—

Local extent.

1. This Act extends to the whole of British India.

Conditions upon which marriages under Act may be celebrated.

2. Marriages may be celebrated under this Act between persons neither of whom professes the Christian, or the Jewish, or the Hindu, or the Muhammadan, or the Parsi, or the Buddhist, or the Sikh, or the Jaina religion, upon the following conditions:—

(1.) Neither party must, at the time of the marriage, have a husband or wife living.

(2.) The man must have completed his age of eighteen years, and the woman her age of fourteen years, according to the Gregorian calendar:—

(3.) Each party must, if he or she has not completed the age of twenty-one years, have obtained the consent of his or her father or guardian to the marriage:

(4.) The parties must not be related to each other in any degree of consanguinity or affinity which would, according to any law to which either of them is subject, render a marriage between them illegal.

1st Proviso.—No such law or custom, other than one relating to consanguinity or affinity, shall prevent them from marrying.

2nd Proviso.—No law or custom as to consanguinity shall prevent them from marrying, unless a relationship can be traced between the parties through some common ancestor, who stands to each of them in a nearer relationship than that of great-great-grandfather or great-great-grandmother, or unless one of the parties is the lineal ancestor, or the brother or sister of some lineal ancestor, of the other.

Appointment of Marriage Registrars.

3. The local Government may appoint one or more Registrars under this Act,* either by name or as holding any

* See *Calcutta Gazette*, 22nd May 1872, p. 2321:
Bombay Government Gazette, 26th September 1872, p. 1046;
Fort St. George Gazette, 24th December 1872, p. 2064.

office for the time being, for any portion of the territory subject to its administration. The officer so appointed shall be called "Registrar of Marriages under Act III. of 1872," and is hereinafter referred to as the "Registrar." The portion of territory for which any such officer is appointed shall be deemed his district.

One of the parties to intended marriage to give notice to Registrar.

4. When a marriage is intended to be solemnized under this Act, one of the parties must give notice in writing to the Registrar before whom it is to be solemnized.

The Registrar to whom such notice is given must be the Registrar of a district within which one at least of the parties to the marriage has resided for fourteen days before such notice is given.

Such notice may be in the form given in the first schedule to this Act.

Notice to be filed and copy entered in the Marriage Notice Book.

5. The Registrar shall file all such notices and keep them with the records of his office, and shall also forthwith enter a true copy of every such notice in a book to be for that purpose furnished to him by the Government, to be called the "Marriage Notice Book under Act III. of 1872," and such book shall be open at all reasonable times, without fee, to all persons desirous of inspecting the same.

Objection to marriage.

6. Fourteen days after notice of an intended marriage has been given under section 4, such marriage may be solemnized, unless it has been previously objected to in the manner hereinafter mentioned.

Any person may object to any such marriage on the ground that it would contravene some one or more of the conditions prescribed in clause (1), (2), (3), or (4) of section 2.

The nature of the objection made shall be recorded in writing by the Registrar in the register, and shall, if neces-

sary, be read over and explained to the person making the objection, and shall be signed by him or on his behalf.

Procedure on receipt of objection.

7. On receipt of such notice of objection the Registrar shall not proceed to solemnize the marriage until the lapse of fourteen days from the receipt of such objection, if there be a Court of competent jurisdiction open at the time, or, if there be no such Court open at the time, until the lapse of fourteen days from the opening of such Court.

Objector may file suit.

The person objecting to the intended marriage may file a suit in any Civil Court having local jurisdiction (other than a Court of Small Causes) for a declaratory decree, declaring that such marriage would contravene some one or more of the conditions prescribed in clause (1), (2), (3), or (4) of section 2.

Certificate of filing of suit to be lodged with Registrar.

8. The officer before whom such suit is filed shall thereupon give the person presenting it a certificate to the effect that such suit has been filed. If such certificate be lodged with the Registrar within fourteen days from the receipt of notice of objection, if there be a Court of competent jurisdiction open at the time, or, if there be no such Court open at the time, within fourteen days of the opening of such Court, the marriage shall not be solemnized till the decision of such Court has been given, and the period allowed by law for appeals from such decision has elapsed; or, if there be an appeal from such decision, till the decision of the Appellate Court has been given.

If such certificate be not lodged in the manner and within the period prescribed in the last preceding paragraph, or if the decision of the Court be that such marriage would not contravene any one or more of the conditions prescribed in clause (1), (2) (3), or (4) of section 2, such marriage may be solemnized.

If the decision of such Court be that the marriage in question would contravene any one or more of the conditions

prescribed in clause (1), (2), (3), or (4), of section 2, the marriage shall not be solemnized.

Court may fine when objection not reasonable.

9. Any Court in which any such suit as is referred to in section 7 is filed, may, if it shall appear to it that the objection was not reasonable and *bonâ fide*, inflict a fine, not exceeding one thousand rupees, on the person objecting, and award it, or any part of it, to the parties to the intended marriage.

Declaration by parties and witnesses.

10. Before the marriage is solemnized, the parties and three witnesses shall, in the presence of the Registrar, sign a declaration in the form contained in the second schedule to this Act. If either party has not completed the age of twenty-one years, the declaration shall also be signed by his or her father or guardian, except in the case of a widow, and, in every case, it shall be countersigned by the Registrar.

Marriage how to be solemnized.

11. The marriage shall be solemnized in the presence of the Registrar and of the three witnesses who signed the declaration. It may be solemnized in any form, provided that each party says to the other, in the presence and hearing of the Registrar and witnesses, "I [*A*] take the [*B*] to be my lawful wife (*or* husband)."

Place where marriage may be solemnized.

12. The marriage may be celebrated either at the office of the Registrar or at such other place, within reasonable distance of the office of the Registrar, as the parties desire: Provided that the local Government may prescribe the conditions under which such marriages may be solemnized at places other than the Registrar's office,* and the additional fees to be paid thereupon.

Certificate of marriage.

13. When the marriage has been solemnized, the Registrar shall enter a certificate thereof in a book to be kept by him for that purpose, and to be called the "Marriage Certificate Book under Act III. of 1872," in the form given in the

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* See *Calcutta Gazette*, 22nd May 1872, p. 2322.

third schedule to this Act, and such certificate shall be signed by the parties to the marriage and the three witnesses.

Fees.

14. The local Government shall prescribe the fees to be paid to the Registrar for the duties to be discharged by him under this Act.*

The Registrar may, if he think fit, demand payment of any such fee before solemnization of the marriage or performance of any other duty in respect of which it is payable.

The said Marriage Certificate Book shall, at all reasonable times, be open for inspection, and shall be admissible as evidence of the truth of the statements therein contained. Certified extracts therefrom shall, on application, be given by the Registrar on the payment to him by the applicant of a fee to be fixed by the local Government for each such extract.

Penalty on married person marrying again, under Act.

15. Every person who, being at the time married, procures a marriage of himself to be solemnized under this Act, shall be deemd to have committed an offence under section 494 or section 495 of the Indian Penal Code, as the case may be; and the marriage so solemnized is void.

Punishment for bigamy.

16. Every person married under this Act, who, during the life-time of his or her wife or husband, contracts any other marriage, shall be subject to the penalties provided in sections 494 and 495 of the Indian Penal Code for the offence of marrying again during the life-time of a husband or wife, whatever may be the religion which he or she professed at the time of such second marriage.

Indian Divorce Act to apply.

17. The Indian Divorce Act shall apply to all marriages contracted under this Act and any such marriage may be declared null or dissolved in the manner therein provided

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*See *Calcutta Gazette* 22nd May 1872, p. 2322:
Bombay Government Gazette, 26th September 1872, p. 1047:
Fort St. George Gazette, 24th December 1872, p. 2064.

and for the causes therein mentioned, or on the ground that it contravenes some one or more of the conditions prescribed in clause (1), (2), (3), or (4), of section 2 of this Act.

Law to apply to issue of marriages under Act.

18. The issue of marriages solemnized under this Act shall, if they marry under this Act, be deemed to be subject to the law to which their fathers were subject as to the prohibition of marriages by reason of consanguinity and affinity, and the provisoes to section 2 of this Act shall apply to them.

Saving of marriages solemnized otherwise than under Act.

19. Nothing in this Act contained shall affect the validity of any marriage not solemnized under its provisions; nor shall this Act be deemed directly or indirectly to affect the validity of any mode of contracting marriage; but if the validity of any such mode shall hereafter come into question before any Court, such question shall be decided as if this Act had not been passed.

20. [*Repealed by Act No. XII. of 1876.*]

Penalty for signing declarations or certificates containing false statements.

21. Every person making, signing, or attesting any declaration or certificate prescribed by this Act, containing a statement which is false, and which he either knows or believes to be false or does not believe to be true, shall be deemed guilty of the offence described in section 199 of the Indian Penal Code.

FIRST SCHEDULE.

(See section 4.)

NOTICE OF MARRIAGE.

To , a Registrar of Marriages under Act III: of 1872, for the District.

I hereby give you notice that a marriage under Act III. of 1872 is intended to be had, within three calendar months from the date hereof, between me and the other party herein named and described (that is to say):—

Names	Condition.	Rank or Profession.	Age.	Dwelling place.	Length of residence.
A. B.	*Unmarried. Widower.*	*Landowner.*	*Of full Age.*	...	*23 days.*
C. D.	*Spinster.*	...	*Minor*	...	...

Witness my hand, this day of 187 .

(Signed) *A. B.*

SECOND SCHEDULE.

(See section 10)

Declaration to be made by the Bridegroom

I, *A B*, hereby declare as follows:—

1. I am at the present time unmarried:

2. I do not profess the Christain, Jewish, Hindu, Muhammadan, Pársí, Buddhist, Sikh or Jaina religion:

3. I have completed my age of eighteen years:

4. I am not related to *C D* [*the bride*] in any degree of consanguinity or affinity which would, according to the law to which I am subject, or to which the said *C D* is subject, and subject to the provisoes of clause (4) of section 2 of Act III. of 1872, render a marriage between us illegal:

[*And when the bridegroom has not completed his age of twenty-one years:*]

5. The consent of my father [*or guardian, as the case may be*] has been given to a marriage between myself and *C D*, and has not been revoked:]

6. I am aware that, if any statement in this declaration is false, and if in making such statement, I either know or believe it to be false, or do not believe it to be true, I am liable to imprisonment, and also to fine.

(*Signed*) *A B* [*the bridegroom*]

Declaration to be made by the Bride.

I, *C D*, hereby declare as follows:—

1. I am at the present time unmarried:

2. I do not profess the Christian, Jewish, Hindu, Muhammadan, Pársi, Buddhist, Sikh, or Jaina religion:

3. I have completed my age of fourteen years:

4. I am not related to *A B* [*the bridegroom*] in any degree of consanguinity or affinity which would, according to the law to which I am subject, or to which the said A B is subject, and subject to the provisoes of clause (4) of section 2 of Act III. of 1872, render a marriage between us illegal:

[*And when the bride has not completed her age of twenty-one years, unless she is a widow:*]

5. The consent of *M N*, my father [*or guardian, as the case may be*] has been given to a marriage between, myself and *A B*, and has not been revoked:]

6. I am aware that, if any statement in this declaration is false, and if, in making such statement, I either know or believe it to be false, or do not believe it to be true, I am liable to imprisonment, and also to fine.

(Signed) C D [the bride].

Signed in our presence by the above-named *A B* and *C D*:

G H,
I J, } *[three witnesses].*
K L,

[*And when the bridegroom or bride has not completed the age of twenty-one years, except in the case of a widow*:]

Signed in my presence and with my consent by the above-named *A B* and *C D*;

M N, the father [*or guardian*] of the above-named *A B* [*or C D, as the case may be.*]

(Countersigned) E F.
Registrar of Marriages under Act III. of 1872, for the District of

Dated the day of 18

THIRD SCHEDULE.

(See section 13.)

Registrar's Certificate.

I, E F, certify that, on the of 18, appeared before me *A B* and *C D*, each of whom in my presence and in the presence of three credible witnesses, whose names are signed hereunder, made the declarations required

by Act III of 1872, and that a marriage under the said Act was solemnized between them in my presence.

(Signed) *E F,*
Registrar of Marriages under Act III. of 1872 for the District of

(Signed) *A B,*
C D.

G H,
I J, } [*three witnesses*]
K L,

Dated the day of 18

THE INDIAN MAJORITY ACT.

No. IX. OF 1875.

An Act to amend the law respecting the age of majority.

Preamble. WHEREAS, in the case of persons domiciled in British India, it is expedient to prolong the period of nonage, and to attain more uniformity and certainty respecting the age of majority than now exists; It is hereby enacted as follows:—

Short title. 1. This Act may be called "The Indian Majority Act, 1875."

Local extent. It extends to the whole of British India, and, so far as regards subjects of Her Majesty, to the dominions of Princes and States in India in alliance with Her Majesty.

Commencement and operation. And it shall come into force and have effect only on the expiration of three months from the passing thereof.

2. Nothing herein contained shall affect—

(*a*) the capacity of any person to act in the following matters (namely),—Marriage, Dower, Divorce, and Adoption;

(*b*) the religion or religious rites and usages of any class of her Majesty's subjects in India; or

(c) the capacity of any person who before this Act comes into force has attained majority under the law applicable to him.

Age of majority of persons domiciled in British India.

3. Subject as aforesaid, every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, shall, notwithstanding anything contained in the Indian Succession Act (No. X. of 1865) or in any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years and not before.

Subject as aforesaid, every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before.

Age of majority how computed.

4. In computing the age of any person, the day on which he was born is to be included as a whole day, and he shall be deemed to have attained majority, if he falls within the first paragraph of section 3, at the beginning of the twenty-first anniversary of that day, and if he falls within the second paragraph of section 3, at the beginning of the eighteenth anniversary of that day.

Illustrations.

(a.) Z is born in British India on the first day of January, 1850, and has a British Indian domicile. A guardian of his person is appointed by a Court of Justice. Z attains majority at the first moment of the first day of January 1871.

(b.) Z is born in British India on the twenty-ninth day of February, 1852, and has a British Indian domicile. A guardian of his property is appointed by a Court of Justice. Z attains majority at the first moment of the twenty-eighth day of February, 1873.

(c.) Z is born on the first day of January, 1850. He acquires a domicile in British India. No guardian is appointed of his person or property by any Court of Justice, nor is he under the jurisdiction of any Court of Wards. Z attains majority at the first moment of the first day of January, 1868.

EXTRACTS.

HINDU LAW AT THE PRESENT DAY.

(Correll's Hindu Law, vol. i., p. 2)

With Hindu law, as it may have been ages ago, or as it was originally declared by the ancient authorities, we have to do only as with the ancient framework of an historic society. The early precepts of the Hindu law-givers have been controlled by the vicissitudes of experience; and the rules of law, which at the present day govern the lives and property of Hindus, depend partly upon the doctrines received by the various schools of interpretation of the sacred text, and partly upon the usages which have obtained in particular classes or localities, and are adapted to existing habits and customs, subject to such modifications, changes, and improvements, as have been, from time to time, introduced during the last century by the action of the English Legislature and the decisions of English Courts.

WHO ARE GOVERNED BY HINDU LAW.

Tagore Law Lectures, 1878, p. 16.

I pass on to the consideration of the third question—Who are governed by the Hindu law?—a question of much practical importance, and not altogether free from difficulty. The readiest answer which one would be tempted to return to the question is, that the Hindus are the people who are governed by the Hindu law; and this, no doubt, is in accordance with the provision of the Charters of the several High Courts and the different Civil Courts' Acts,* which declare that in cases relating to marriage, succession, and a few other matters, the Hindu law shall apply to Hindus,

* Act VI of 1871, s. 21; Act IV of 1872, s. 5; Act III of 1873, s. 16.

But the question then arises, who are the Hindus? The name 'Hindu' is not very definite in its signification. In the Anglo-India law-language of the last century, the word '*Gentoo*' (a word of curious derivation and supposed to be connected with *gentoo*, or rather *jantu*, an animal, and *gentile*, a pagan) occurs as a frequent substitute for it; and Halhed, the translator of the Digest of Hindu Law known as the Code of Gentoo Laws, tells us that that word was used as a name for those who professed the Brahmanical religion.* The word 'Hindu' is of foreign origin,† and is derived from the word 'Indus' or 'Sindhu'; and it was used by the Mahomedans to designate the people living to the east of that river. Etymologically, therefore, the word means an inhabitant of India, and applies to a Buddhist as much as to a Vaishnava. But this evidently is not its meaning in the enactments above referred to. There are indications in the law‡ from which it is clear that 'Hindu' in legal phraseology originally meant a *bonâ fide* follower of the Brahmanical religion, or, as the Privy Council in the case of *Abraham* v. *Abraham*‖ expressed it, a Hindu not by birth merely but by religion also. And considering that it is in pursuance of the policy of religious toleration that the Legislature has abstained from enacting territorial laws applicable to all India, and has allowed particular races to be governed by their own laws one would expect this to be the sense in which the term is used in the above-mentioned Acts. But it would hardly be right at the present day to limit the application of the term to *bonâ fide* followers of the Brahmanical faith. To say nothing of those, and they are not a few,

* Code of Gentoo Laws; Pref. p. xxii.

† In the Merutantra, quoted in the Sabdakalpadruma, the word 'Hindu' is sought to be derived from two Sanskrit word *Hina* (low), and *Dosayati* (condemns); so that a Hindu would mean one who condemns the low; but this *Tantra* bears evident traces of recent fabrication, and the derivation it gives, however flattering to the national pride of the Hindus, must be given up as incorrect.

‡ See Ben. Reg. VII of 1832, s. 9.

‖ I W. R. [P. C.], 1.

whose observance of Hinduism is mere matter of outward form and social convenience, there are classes of persons such as the Brahmos, who do not observe even that outward form. Such persons cannot be called Hindus in the above sense of the term: and yet it would be going too far to hold that they are not Hindus within the meaning, for instance, of section 331 of Act X of 1865, and that succession to their property should be regulated by the Indian Succession Act, and not by the Hindu law. To include such persons within the category of Hindus, we must extend the meaning of the term, and take it to signify not only Hindus by religion, but also their descendants who have not openly abjured the Hindu religion.

It remains, however, to ascertain who are Hindus by religion. For our present purpose, we may divide the population of India into three sections,—*first*, the descendants of the aboriginal tribes who have more or less avoided complete conversion to the Brahmanical religion; *second*, the descendants of the early Aryan settlers and of such aboriginal races as have been completely absorbed in the Aryan community; and, *third*, modern settlers of various religious persuasions, such as Mahomedans, Christians, and Parsis. As the third class can never be confounded with the Hindus, we may leave it out of consideration. The second division, which comprises the Hindus properly so called, has never been completely homogeneous in religion, and it has thrown off various sects at different times. But as this heterogeneous body and its numerous offshoots admit more or less the authority of the *Vedas*, and conform to a few other fundamental tenets of the Brahmanical faith, the highly tolerant character of that faith admits them all as being within the pale of orthodoxy, and so they may all be regarded as Hindus. There are only three Indian sects of importance—the Buddhists, the Jainas, and the Sikhs—who have entirely repudiated Brahminism, and who ought to be

excluded from the category of Hindus; and judging from the language of certain enactments* in which those three sects are mentioned as classes co-ordinate with the Hindus, it would follow that the Legislature intends such exclusion. But I may observe that, in the absence of evidence of any separate law or usage governing these sects, the Hindu law has been held to apply to them.† The first section comprises a considerable portion of the population of the Madrás Presidency and Central India, and the hill tribes of various other parts of India. Their customs and their religion differ widely from those of the Hindus properly so called. They have no codes of law, but in some instances they have adopted much that is Hindu in their customs and religion, and some of these tribes, such as the Koch and others, have been described by Dalton as the Hinduised aborigines of India.‡ These semi-Hindu races have been sometimes regarded as Hindus, and, therefore, subject to the Hindu law. But this is an error which proceeded from our ignorance of the customs and religion of these races. As more is now known of them than before, better provision is now made for the administration of justice to them. Thus we find in the Civil Courts Acts and Local Laws Acts, that, in addition to Hindu law, custom, which is the chief source of their law, is expressly declared to be the rule of decision in certain cases.

Though the Hindu law, being only the personal law of the Hindus, can have no binding force on any one who renounces the Hindu religion, yet, he may, if he chooses, "abide by the old law, notwithstanding he has renounced the old religion." This doctrine was laid down by the Privy Council in the case of *Abraham* v. *Abráham*.‖ Lord

*Act XVII of 1875, s. 4; Act XXI of 1870.

† Lalla Mohabeer Pershad *v.* Mussamut Kundun Koowar, 8 W. R., 116; Lopes *v.* Lopes, 5 Bom., O. C. J., 185; Bhágvándás Tejmál *v.* Rajmal 10 Bom., 268, 295. See also Sheo Singh Rai *v.* Dakho, I. L. R. 1 All., 668.

‡ Descriptive Ethnology of Bengal, pp. 2, 89, &c.

‖ 1 W. R. [P. C.], 1.

Kingsdown, in delivering the judgment of the Judicial Committee in that case, observed:—"The profession of Christianity releases the convert from the trammels of the Hindoo law, but it does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity has no concern, such as his rights and interests in, and his powers over, property. The convert, though not bound as to such matters either by the Hindoo law or by any positive law, may, by his course of conduct after his conversion, have shown by what law he intended to be governed as to these matters. He may have done so either by attaching himself to a class which, as to these matters, has adopted and acted upon some particular law, or by having himself observed some family usage or custom, and nothing can surely be more just than that the rights and interests in his property, and his powers over it, should be governed by the law which he has adopted or the rules he has observed."

HINDU LAW TO WHOM APPLICABLE.

(Cowell's Hindu Law; vol. i., pp. 3—6.)

Hindu law has obligatory force only upon those who are Hindus both by birth and by religion. When a Hindu is converted to Christianity or to Mahomedanism, and has shown, by his course of conduct after his conversion, what rules and customs he has adopted, he is released from the trammels of Hindu law, and is thenceforth governed by the law and usage of the class with which he has associated himself.* And even within the limits of that large community which is Hindu both by birth and by religion, there is considerable scope for personal choice as to the school of law by which the individual or the family is to be governed. For, as families or individuals migrate from one country to another, they may choose whether they will retain the shasters and

* *Abraham* v. *Abraham*; 1 S. W. R., P. C., 5; and 9 Moore's I. A. 227.

usages prevalent in the country which they leave, or adopt those which they find to be general in the country in which they settle.

This freedom of choice, as to the particular shasters or school of law by which he was to be governed, was declared to be the right of a Hindu by an early decision* of the Privy Council. Neither the *situs* of the property, nor the domicile of the owner, determines the law which affects his rights. A Hindu may import into any country to which he migrates the particular law of his own tribe, the governing circumstance to be attended to in deciding by what law he is bound being the intention as manifested by the character of the *purohit*, ceremonies and usages, which he, or his descendants after him, retains about him. Whatever, therefore, may have been the case formerly, and whatever may be the case now, where a Hindu passes from one native territory to another, he nevertheless can move from one district to another within the limits of British territories, and carry with him, as a personal law applicable to his family and his possessions, the rules of the shasters under which he has lived up to the time of his migration. Further than this,

Rutchepully Dutt Jha and others v. *Rajunder Narain Rae and others*, 2 Moore's I. A. 132. The point at issue in this case was whether the laws, according to the shasters current in Mithila, should govern the right of succession to property derived from an ancestor who had originally emigrated from that district, and whose descendants had uniformly retained in Bengal the religious ceremonies and usages to which the family had been accustomed. It had been held by the Sudder Dewanny Adawlut† in 1801 that, if a person of Mithila family living in Bengal continue the observance of the Mithila shasters on occasions of marriages and mournings in his family, and have a Mithila *purohit*, or priest, to perform his ceremonies, his legal rights were to be determined according to the Mithila shasters; but that if those ceremonies were performed by him according to the Bengal shasters, his rights should be determined by the Bengal shasters. The same doctrine was affirmed in the case of *Ranee Sreemutty Debea* v. *Ranee Rung Luta*, 4 Moore's I. A. 292, where a family of Sutgop Brahmins migrating from Bengal to Midnapore, where the Mitakshara law prevailed, were held to be subject to Bengal law in respect to inheritance to property situated in Midnapore, they being shown to have performed their religious ceremonies according to the Bengal authorities.

† *Rajchunder Narain Chnder Chowdhry* v. *Goculchand Goh*. Reports of Select Cases, vol. i. [new edition], p. 56.

the doctrine* is now established, that a Hindu so migrating must be presumed, until the contrary be shewn, to have brought with him and retained all his religious ceremonies and customs, and consequently the law of succession and of property which is associated with them. This is more especially the case when the family is shewn to have brought with it its own priests who continue their ministrations. Although the presumption is in favour of a Hindu retaining the shasters of his birth, yet the principle has been definitively affirmed by the Privy Council, that a Hindu may, if he chooses, change the shasters or school of law by which he wishes to be governed.† The real test to be applied is by what shasters the customs and rites of marriages and funerals are conducted; occasional or daily religious services may be changed without effecting a corresponding change in a Hindu's legal liabilities.‡

The principle thus laid down is consistent with the theory that Hindu law is a personal law, one that applies in its various forms to individuals and families, and not to localities, and has been secured to Hindus chiefly because it is so largely (to an extent which these lectures must describe) associated with their religion. The designation of the different schools is derived from the names of provinces, and it is common to allude to Hindu law as current in a particular province. Such phraseology is, no doubt, sufficiently accurate for ordinary purposes, for, as a general rule,

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* *Nobinchunder Perdhan* v. *Janardhun Misser*. Suth. F. B. Rulings, 67.

† *Ranee Pudmavati* v. *Baboo Doolar Sing*, reported in 4 Moore's I. A., 259, was a case of a family of Bengalee Sudras which had migrated at a remote period from the district of Burdwan to the district of Purneah. A number of customs were described which the Hindu law-officer declared to be part of the Mithila law, and it was held that the family, although originally subject to Bengal law, had, since their migration, adopted and performed the religious rites and ceremonies of Mithila, and were therefore subject to its law.

‡ *Kumud Chunder Roy* v. *Seetalnath Roy* Suth F. B. 75: *Ranee Pudmavati* v. *Baboo Doolar Sing*, 7 S. W. R., P. C., 41.

those resident in a particular locality follow the same shasters; but, nevertheless, it is erroneous in so far as it conveys the notion of a law whose operation is confined to particular localities. There are at this moment numbers of Hindus resident in Calcutta who are governed by the law according to the school of Benares or of Mithila, and it is possible that all five schools of Hindu law may be current, in the sense of being applied, in any one province. Hindu law is personal, and not local. A Hindu may throw it from him altogether by changing his religion, and he may choose to adopt it in any one of its various forms. But so long as a Hindu by birth retains the Hindu religion, he is amenable to Hindu law in one form or other, whether he wishes it or not.

SOURCES OF HINDU LAW.

[Account by H. T. Colebrooke, Esq.]

(*Strange's Hindu Law, p. 315*)

The laws of the Hindus, civil and religious, are by them believed to be alike founded on revelation, a portion of which has been preserved in the very words revealed, and constitutes the Vedas, esteemed by them as sacred writ. Another portion has been preserved by inspired writers, who had revelation present to their memory, and who have recorded holy precepts, for which a divine sanction is to be presumed. This is termed *smriti*, recollection (remembered law), in contradistinction to *sruti*, audition (revealed law).

The Vedas concern chiefly religion, and contain few passages directly applicable to jurisprudence. The law, civil and criminal, is to be found in the *smriti*, otherwise termed *Dharma Sastra*, inculcating duty, or means of moral merit. So much of this, as relates to religious observances, may be classed, together with ancient and modern rituals, (being the designation of *(Calpa or Paddhari,)* as a separate branch; and forensic law is more particularly understood when the the *Dharma Sastra* is treated of.

That law is to be sought primarily in the institutes, or collections (*sankitas*) attributed to holy sages: the true authors, whoever these were, having affixed to their compositions the names of sacred personages such as Menu, Yajnyawalkya, Vishnu, Parasara, Gautama, &c. They are implicitly received by Hindus, as authentic works of those personages. Their number is great: the sages reputed to be the authors being numerous (according to one list, eighteen; according to another, twice as many; according to a third, many more); and several works being ascribed to the same author; his greater or less institutes (Vrihat, or Caghu) or a later work of the author, when old (Vriddha).

The written law, whether it be *sruti* or *smriti*, direct revelation or tradition, is subject to the same rules of interpretation. Those rules are collected in the *Mimansa*, which is a disquisition on proof and authority of precepts. It is considered as a branch of philosophy; and is properly the logic of the law.

In the eastern part of India, viz., Bengal and Behar, where the Vedas are less read, and the Mimansa less studied than in the south, the dialectic philosophy, or *Nyaya*, is more consulted, and is there relied on for rules of reasoning and interpretation upon questions of law, as well as upon metaphysical topics.

Hence have arisen two principal sects or schools, which, construing the same text variously, deduce upon some important points of law different inferences from the same maxims of law. They are sub-divided, by farther diversity of doctrine, into several more schools or sects of jurisprudence, which, having adopted for their chief guide a favourite author, have given currency to his doctrine in particular countries, or among distinct Hindu nations: for the whole Hindu people comprise divers tongues; and the manners and opinions, prevalent among them, differ not less than their language.

The school of Benares, the prevailing one in middle India, is chiefly governed by the authority of the *Mitacshara* of *Vijynaneswara* a commentary on the institutes of Yajnyawalkya. It is implicitly followed in the city and province of Benares: so much so, that the ordinary phraseology of references for law-opinions of Pundits, from the Native Judges of Courts established there, previous to the institution of Adawluts superintended by English Judges and Magistrates, required the Pundit, to whom the reference was addressed, to "consult the Mitacshara," and report the exposition of the law there found, applicable to the case propounded.

A host of writers might be named, belonging to this school, who expound, illustrate, and defend the *Mitacshara's* interpretation of the law. It may be sufficient to indicate in this place, the *Viramitrodaya* of *Mitra Misra* and the *Vivadatandava* and other works of *Camalacara*. They do not, so far as is at present recollected, dissent upon any materal question from their great master.

The *Mitacshara* retains much authority likewise in the south and in the west of India. But to that are added, in the peninsula, the *Smriti Chandrica* and other works bearing a similar title (as *Dattaca Chandrica*, &c.) compiled by *Devanda Bhatta*, together with the works of *Madhava Acharya*, and especially the Commentary on *Parasara*, and likewise the writings of *Nunda Pandita*, including his *Vaijayanti* and *Dattaca Mimansa*; and also some writers of less note.

In the west of India, and particularly among the Marahattas, the greatest authority, after the *Mitacshará is Nilacant'ha* author of the *Vyavahara Mayucha* and of other treatises bearing a similar title.

In the east of India, *Mitacshara*, though not absolutely discarded, is of less authority, having given place to others, which are there preferably followed. In North Behar, or Mithila, the writings of numerous authors, natives of that province, prevail; and their doctrine, sanctioned by the authority of the paramount Raja of the country, is known as that of the Mithila school. The most conspicuous works are the *Vivada Ratnacara*, and other compilations under the superintendence of *Chandeswara*: the *Vivada Chintamani*, with other treatises by *Vachespati Misra*; and the *Vivada Chandra*, with a few more.

To these are added, in Bengal, the works of *Jimuta vahana* and those of *Raghunandana*, and several others

constituting a distinct school of law, which deviates on many questions from that of *Mithila*, and still more from those of Benares, and the Dekhin or southern peninsula.

GRADUAL GROWTH OF HINDU LAW.

(Cowell's Hindu Law, vol, i., p. 13)

The earlier Rishis delivered their precepts to the entire community. The later commentators addressed themselves to the inhabitants of particular localities, and in the gloss which they respectively put upon the ancient texts of which they treated, they may have been guided by the wishes of the reigning power, or by attention to the usages which had obtained in the particular districts during the lapse of ages. Thus, the authority of the modern commentator, whenever his work was received, came to supersede the reverence due to the earliar sage. The most striking instance of this is afforded by Yajnavalkya. His Institutes, throughout India, are of the highest and most sacred authority, admitted and recognized everywhere. The Mitacshara is a commentary upon these Institutes less than 1000 years old; composed by a hermit named Vijnyaneswara; and is universally accepted by all the schools, even by that of Bengal, except so far as it is in that school controlled upon various points by what the followers of that school consider to be the superior authority of the work of Jimutavahana. The Mitacshara is perhaps the most celebrated and the most widely authoritative treatise or commentary in existence on the work of the ancient sages. The Dayabhaga, on the other hand, acknowledges equally, with the Mitacashara, the authority of the Institutes of Yajnavalkya; but at the same time its doctrines are upon several essential points in the law both of persons and of property widely different from those of the rival treatise. It is the work of Jimuta-

vahana, who appears to have flourished later than Vijnyaneswara, but earlier than Raghunandana, and who therefore must have composed his work, according to Mr. Colebrooke,* at a date somewhat earlier than the beginning of the sixteenth century.

SCHOOLS OF HINDU LAW.

(Cowell's Hindu Law, vol. i., p. 16.)

Five schools of Hindu law exist at the present day, viz., the Bengal, Mithila, Benares, Maharatta and Dravida schools. The Dayabhaga with its recognized commentaries, the Dayatatwa, and the Dayasangraha, are the peculiar authorities of the school of Bengal. In Mithila, the Vivada Chintamani and other works are especially followed. In the Madras Presidency, the *Mitacshara* and the *Smriti Chandrica* and the *Madhavya*; and in the territories of Bombay, the *Mayukha* and the *Kaustabha* treatises are of leading importance. The *Dattaka Mimansa* and the *Dattaka Chandrica* are the standard authorities on the law of adoption, the latter being preferred in Bengal upon points in which they differ. [The school of Benares is chiefly governed by the Mitakshara, whose authority is fortified by the works of Mitra Misser and Camalakara, the Viramitrodaya being the most celebrated among them.] Each school has, therefore, the authorities which it adopts as of peculiar and special weight. Books which are thus adopted by one school may be, and are, consulted by the other schools, when they do not contradict the special doctrine of the rival sect. Upon points of Hindu law, which are of general application, the authorities of any school may be indiscriminately cited, so long as they do not contravene the rules of law which have obtained exclusively in a particular province. We have, accordingly,

* See Steele pp. 29. 30. 165.

for the sources of the Hindu law, as administered *in Hindú territories*, the old traditional authorities, the authoritative commentators, the approved customs of districts, and, where all these fail, the exposition of law by learned Brahmins, who are the repositories of legal science and religious knowledge.

(Mayne's Treatise on Hindu Law and Usage, p. 28.)

Only two schools of law.

§ 33. III. DIFFERENT SCHOOLS OF LAW.—The term "school of law," as applied to the different legal opinions prevalent in different parts of india, seems to have been first used by Mr. Colebrooke (*d*). He points out that there really are only two schools marked by a vital difference of opinion, *viz.*, those who follow the Mitakshara, and those who follow the Daya Bhaga. Those who fall under the former head are again divided by minor differences of opinion, but are in principle substantially the same. Of course in every part of India, though governed by practically the same law, the pundits refer preference to the writers who lived nearest to, and are best known to, themselves; just as English, Irish, and American lawyears refer to their own authorities, when attainable, on any point of general jurisprudence. This has given rise to the idea that there are as many schools of law as there are sets of local writers, and the subdivision has been carried to an extent for which it is impossible to suggest any reason or foundation. For instance, Mr. Morley speaks of a Bengal, a Mithilá, a Benares, a Maharashtra, and a Dravida School, and subdivides the latter into a Dravida, a Karnataka and an Andhra division (*e*). So the Madras High Court and the Judicial Committee distinguish between the Benares and the Dravida schools of

[*d*] 1 Stra. H. L. 315. As to the mode in which such divergences sprung up, see the remarks of the Judicial Committee in the *Ramnad case, Collector of Madura* v. *Moottoo Ramalinga*, 12 M. I. A. 435; S. C. 10 Suth. [P. C.] 17; S. C. 1 B. L. R. [P. C.] 1.

[*e*] 1 M. Dig. Introd. 221.

law (*f*) and distinction between an Andhra and a Dravida School has also received a sort of quasi-recognition (*g*). On the other hand, Dr. Burnell redicules the use of the terms Karnataka and Andhra, which he declares to be wholly destitute of meaning, while the term Dravidian has a very good philological sense, but no legal signification whatever. Practically he agrees with Mr. Colebrooke in thinking that the only distinction of real importance is between the followers of the Mitakshara and the followers of the Daya bhaga (*h*).

Causes of variance.

§ 34. In discussing this subject, it seems to me that we must distinguish between differences of law arising from differences of opinion among the Sanskrit writers, and differences of law arising from the fact that their opinions have never been received at all, or only to a limited extent. In the former case there are really different schools of law; in the latter case there are simply no schools. I think it will be found that the differences between the law of Bengal and Benares come under the former head, while the local variances which exist in the Punjab, in Western, and in Southern, India, come under the latter head.

The Daya bhaga.

§ 35. Any one who compares the Dayabhaga with the Mitakshara will observe that the two works differ in the most vital points, and that they do so from the conscious application of completely different principles. These will be discussed in their appropriate places through this work, but may be shortly summaried here.

First; the Dayabhaga lays down the principle of religious efficacy as the ruling canon in determining the order of succession; consequently it rejects the preference of agnates to cognates, which distinguishes the other systems, and

[*f*] See the *Ramnad adoption suit*, 2 Mad. H. C. 296; 12 M. I. A. 397, *supra* note [d].

[*g*] *Narasimmal* v. *Baldravacharlu*, 1 Mad. H. C. 120.

[*h*] pref. to Varadrajah, 5; Nelson's View of Hindu Law, 28; V. N. Mandlik, Introduction, 70.

arranges and limits the cognates upon principles peculiar to itself (*i*).

Secondly; it wholly denies the doctrine that property is by birth, which is the corner-stone of the joint family system. Hence it treats the father as the absolute owner of the property, and authorises him to dispose of it at his pleasure. It also refuses to recognize any right in the son to a partition during his father's life (*k*).

Thirdly; it considers the brothers, or other collateral members of the joint family, as holding their shares in quasi-severalty, and consequently recognizes their right to dispose of them at their pleasure, while still undivided (*l*).

Fourthly; whether as a result of the last principle, or upon independent grounds, it recognizes the right of widow in an undivided family to succeed to her husband's share, if he dies without issue, and to enforce a partition on her own account (*m*).

Factum valet.

It is usual to speak of the doctrine *factum valet* as one of universal application in the Bengal school. But this is a mistake. When it suits Jimuta Vahana, he uses it as a means of getting over a distinct prohibition against alienation by a father without the permission of his sons (*n*). I am not aware of his applying the doctrine in any other case. No Bengal lawyer would admit of any such subterfuge as sanctioning for instance, the right of an undivided brother to dispose of more than his own share in the family property for his private benefit, or as authorising a widow to adopt without her husband's consent, or a boy to be adopted after *upanayana*, or marriage. The principle is only applied where a legal precept has been already reduced by independent reasoning to a moral suggestion.

[*i*] See *post*, § 423 *et seq.*
[*k*] See *post*. § 221, 232.
[*l*] See *post*, § 238.
[*m*] See *post* § 239, 403.
[*n*] Daya Bhaga, ii § 30.

Females in Western India.

§ 36. Now, in all the above points the remaining parts of India agree with each other in disagreeing with Jimuta Vahana and his followers. Their variances *inter se* are comparatively few and slight. Far the most important is the difference which exists between Western India and the other provinces which follow the Mitakshara, as to the right of females to inherit. A sister, for instance, who is nowhere else recognized as an heir, ranks very high in the order of succession in the Bombay Presidency, and many other heiresses are admitted, who would have no *locus standi* elsewhere (*o*). Any reader of Indian history will have observed the public and prominent position assumed by Mahratta Princesses, and it seems probable that the doctrine which prevails in other districts, that women are incapable of inheriting without a special text, has never been received at all in Western India. Women inherit there, not by reason, but in defiance, of the rules which regulate their admission elsewhere. In their case, written law has never superseded immemorial custom (*p*).

Law of adoption.

§ 37. Another matter as to which there is much variance is the law of adoption. For instance, as regards the right of a widow to adopt a son to her deceased husband. In Mithila no widow can adopt. In Bengal and Benares she can, with her husband's permission. In Southern India, and in the Punjab, she can adopt, even without his permission, by the consent of his sapindas. In Western India she can adopt without any consent (*q*). So as regards the person to be adopted. The adoption of a daughter's, or a sister's, son is forbidden to the higher classes by the Sanskrit writers. It is legal in the Punjab. It is commonly practised, though it has been lately pronounced to be illegal, in the South of

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[*o*] Vyavahara Mayukha iv. 8, § 19; W. B. 183—185.
[*p*] See *post*, § 437, 452—454, 473, 501.
[*q*] See *post*, § 99.

India (*r*). In all these cases we may probably trace a survival ancient practices which existed before a adoption had any religious significance, unfettered by the rules which were introduced when it became a religious rite. The similarity of usage on these points between the Punjab and the South of India seems to me strongly to cofirm this view. It is quite certain that neither borrowed from the other. It is also certain that in the Punjab adoption is a purely secular arrangement. There seems strong reason to suppose that in Southern India it is nothing more (*s*). But what is of importance with regrad to the present discussion is, that these differences find no support in the writings of the early sages, or even of the early commentators. They appear for the first time in treatises which are absolutely modern, or marely in recorded customs. To speak of such variances as arising from different schools of law, would be to invert the relation of cause and effect. We might just as well invent different schools of law for Kent and Middlesex, to account for Gavelkind and the Customs of London. Even Hindu lawyers cannot alter facts. In some instances they try to wrest some holy precept into conformity with the facts (*t*); but in other cases, and especially in Western India, the facts are too stubborn. The more closely we study the works of the different so-called schools of law, other than those of Bengal, the more shall we be convinced that the principles of all are precisely the same. The local usages of the different districts vary, Some of the usages the writers struggle to bring within their rules; others they silently abandon as hopeless. What they cannot account for, they simply ignore (*u*).

[*r*] See post, § 118, 119.

[*s*] See *post*, § 93.

[*t*] See, for instance, the mode in which four conflicting views as to the right of a widow to adopt have been deduced from a single text of Vasishta: *Collector of Madura* v. *Moottoo Ramalinga*, 12 M. I. A. 435; S. C. 10 Suth, [P. C.] 17; S. C. I B. L. R. [P. C.] 1.

[*u*] For instance, second marriages of widows or wives, which are equally practised in the North, the West, and the South of India, see *post*, § 87.

CHARACTERISTICS OF THE HINDU COMMUNITY.

(Cowell's Hindu Law, vol. i., p. 6.)

Now, with regard to the community, it remains at the present day what it was at the time of *Menu*, an aggregation of families rather than of individuals. With such a people as, to some extent with the inhabitants of modern Russia, co-ownership is the normal condition of the rights of property. Commensality, and co-ownership are the characteristics of Hindu family life, and the village community is a political or social expansion of the domestic institution. Individual will and energy are checked by the influences at work in a society by far the largest portion of which rests on a basis of joint responsibility for most of the duties of life, and which sinks the rights of each one in the aggregate claims of the family.

VOID MARRIAGES.

(Guridass Banerjee on Marriage and Stridhana, pp. 196 to 198.)

The causes which render a marriage void *ab initio* are first, difference of caste in the contracting parties; and, second, identity of *gotra*, or relationship within the prohibited degrees. In the former case, according to some authorities, if the error is discovered before *garbhadhan*, the girl is to perform expiation, and may be married again; but after *garbhadhan*, she is no longer eligible for re-marriage, and if of a lower caste, she is liable to be repudiated by her husband, though she is entitled to be maintained, and her issue would be considered illegitimate.* In the latter case, on the error being discovered, the husband is directed to perform penance and repudiate the wife; but he is required to support her.† Her re-marriage, however, is nowhere allowed, even

* See Steele, pp. 29, 30, 166.

† Manu, iii, 5 and 11, Note by Kulluka; Colebrooke's Digest, Bk v. 339, 340.

though the repudiation take place before consummation. The doctrine of the Hindu law is that a girl is blemished by the mere ceremony of marriage, and if married again, the reproach of being a twice-married woman (*punarbhu*) would attach to her, even if she be a *virgo intacta*.* This is hardly just. Even the virgin widow has one consolation for her hard lot, that it is due to a cause which no human foresight could prevent. But the condition of the repudiated virgin wife, who is condemned to a life of virtual widowhood for the error of a reckless guardian, is truly pitiable. A far more rational rule, and one not wholly against the spirit of our law, would be to allow re-marriage in such cases, where the wife is repudiated before consummation. For here the girl is free from blemish by intercourse; and as for the blemish by reason of the nuptial ceremony, such ceremony being performed under a mistake of fact, may, by a principle not altogether unknown to the Hindu law,† be regarded in law as not performed at all. Such a rule seems also to receive some support from the decision of the High Court of Bengal in *Anjona Dossee* v. *Proladth Chunder Ghose*,‡ in which the Officiating Chief Justice Norman, in delivering the judgment of the Court upon the question whether a suit for declaration of the nullity of a Hindu marriage would lie, observed:—

"If the marriage is in fact no marriage, unless she can obtain a declaration from a Court of Justice that the marriage is null and void, unless she can obtain the protection which such Court can give her, she may be obliged to live with the defendant in a state of concubinage, or at least she will be prevented from marrying any one else. The rights which a decree in this suit may protect—with which the

* Colebrooke's Digest, Bk. iv, 158—160.; Manu, viii, 226, 227.

† In the somewhat analogous case a thing given by mistake, Narada declares that it must be considered as not given. See Colebrooke's Digest, Bk. ii., ch. iv., 53; Narada, iv., 8.

‡ 14 W. R., 403.

defendant may be restrained from interfering—the preservation of the personal purity of the infant plaintiff and her right and power to contract a valid marriage—are amongst the highest rights which a human being can possess; and it would be a matter deeply to be lamented if the Court had no power to protect and defend them."

Happily, however, in practice the strictness with which relationship and other particulars are enquired into before making the nuptial contract, reduces the evil here complained of within the narrowest possible limits.

(*Strange's Hindu Law.*)

Where the husband died before consummation, it has been held that his widow is entitled to maintenance only.

PROHIBITED DEGREES OF MARRIAGE.

(Tagore Law Lectures, 1878, pp. 60—68.

Marriage between near blood relations is so universally repugnant to our feelings, that every system of law has its rule of prohibited degrees. The prohibition is also extended by analogy more or less to relations by affinity, fosterage, and adoption. I shall first of all give you the rules regarding prohibited degrees in the Hindu law, and then compare them with those of other systems.

These rules are chiefly based upon the following texts:—

I. "She who is not descended from his paternal or maternal ancestors within the sixth degree (*sapinda*), and who is not known by his family name to be of the same primitive stock with his father or mother, is eligible by a twice-born man for nuptials and holy union."—Manu, III, 5.

Sapinda is the word in the original which has been rendered as '*descended from ancestors within the sixth degree*'—that is, from persons in the ascending line within the *seventh degree* from the intending husband. This rendering is in accordance with the text of Manu (V, 60), which says that the *sapinda* relationship ceases with the seventh person.

11. "Having finished his studentship, let a man espouse a girl endowed with good qualities, one who was never married before, who is possessed of beauty, is not a *sapinda*, and is younger in age."—Yajnavalkya, I, 52.

As it is of importance that you should clearly understand the import of the word *sapinda*, I shall here subjoin the very full explanation of it given by Vijnaneswar in his commentary on the above text:*

"(He should marry a girl) who is son-Sapinda (with himself). She is called his Sapinda who has (particle) of

* Mitakshara [Sans.] Acharadhyaya, leaf 5 *et seq*

the body (of some ancestor, &c.) in common (with him). Non-Sapinda means not his Sapinda. Such a one (he should marry). Sapinda-relationship arises between two people through their being connected by particles of one body. Thus, the son stands in Sapinda-relationship to his father, because of particles of his father's body having entered (his). In like (manner stands the grandson in Sapinda-relationship) to his paternal grandfather and the rest because through his father, particles of his (grandfather's) body have entered into (his own). Just so is (the son a Sapinda-relation) of his mother, because particles of his mother's body have entered (into his). Likewise (the grandson stands in Sapinda-relationship) to his maternal grandfather and the rest through his mother. So also (is the nephew) a Sapinda-relation of his maternal aunts and uncle's, and the rest, because particles of the same body (the paternal grandfather) have entered into (his and theirs); likewise (does he stand in Sapinda-relationship) with Paternal uncles and aunts, and the rest. So also the wife and the husband (are Sapinda-relations to each other), because they together beget one body (the son). In like manner, brothers' wives also are (Sapinda-relations to each other), because they produce one body (the son), with those (severally) who have sprung from one body (*i. e.*, because they bring forth sons by their union with the offspring of one person, and thus their husbands' father is the common bond which connects them). Therefore, one ought to know that, wherever the word Sapinda is used, ere exists (between the persons to whom it is applied), a connection with one body, either immediately or by descent."

"In the explanation of the word 'asapindam' (non-Sapinda, verse 52), it has been said that Sapinda-relation arises from the circumstance that particles of one body have entered into (the bodies of the persons thus related),

either immediately or through (transmission by) descent. But inasmuch as (this definition) would be too wide, since such a relationship exists in the eternal circle of births, in some manner or other, between all men, therefore the author (Yajnavalkya) says, v. 53, 'After the fifth ancestor on the mother's and after the seventh on the father's side. On the mother's side, in the mother's line, after the fifth; on the father's side, in the father's line, after the seventh (ancestor), the Sapinda-relationship ceases;' these latter two words must be understood; and therefore, the word Sapinda, which, on account of its (etymological) import '(connected by having in common) particles (of one body), would apply to all men, is restricted in its signification, just as the word pankaja (which etymologically means 'growing in the mud,' and therefore would apply to all plants growing in the mud, designates the lotus only), and the like; and thus the six ascendants beginning with the father, and the six descendants beginning with the son, and one's self (counted) as the seventh (in each case), are Sapinda-relations. In case of a division of the line also, one ought to count up to the seventh (ancestor), including him with whom the division of the line begins, (*e. g.* two collaterals A and B are Sapindas, if the common ancestor is not further removed from either of them than six degrees) and thus must the counting of the (Sapinda-relationship) be made in every case."*

I ought to add here that the word *sapinda* has, in other places, a meaning different from what is given above. Thus in the chapter on inheritance in the Code of Manu (IX, 186, 187) a *sapinda* means one who is related within the third degree: the *sapinda* relation being there based not on connection through one common body, but on connection through common oblation.†

* The above translation is taken from West and Buhler's Digest, Part I. pp. 141—443.

† See Dattaka Chandrika, Sec. IV, 7—9; Dattaka Mimansa, Sec. *Vi*, 32

III. "One must not marry a girl of the same *gotra or pravaras*, or as far as the fifth in degree form the mother and seventh form the father."—Vishnu Sutra, cited in the Udvahatattwa.

IV. "Girls descended from the father's or mother's *bándhus* are not to be taken in marriage as far as the seventh and fifth respectively, as well as those of the same *gótra* or of equal *pravaras*"—Nárada, cited in the Udvahatattwa.

The word *bandhu*, which occurs in the above text, has been defined in a text quoted anonymously in the Udvahatattwa, which runs thus:—

"The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, *must be considered his father's bandhus. The* sons of his mother's maternal aunt, the sons of his mother's paternal aunt, and the sons of his mother's maternal uncle, must be reckoned his mother's *bandhus*."*

From these texts and a few others, commentators have deduced the following rules:—

Rule I—(*a*)—The female descendants as far as the seventh degree, from the father and his six ancestors, namely, the paternal grandfather, &c.,

(*b.*)—The female descendants as far as the seventh degree, from the father's *bandhus* and their six ancestors, through whom those females are related.

(*c.*)—The female descendants as far as the fifth degree, from the maternal grandfather and his four ancestors, namely, the maternal great grandfather, &c., and,

(*d.*)—The female descendants as far the fifth degree, from the mother's *bandhus* and their four ancestors, through whom those females are related,

are not to be taken in marriage.†

* See Mitakshara, Ch. II, Sec. VI, 1.
† Udvhatattwa, Raghunandath's Institutes, Vol, II, p. 65.

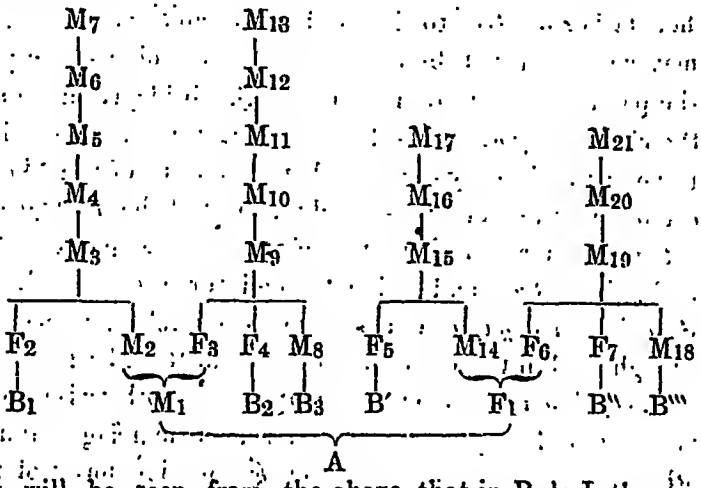
Rule 11.—A step-mother's brother's daughter and his daughter's daughter are not to be taken in marriage.*

Clauses (*a*) and (*c*) in Rule I, are clear enough; but clauses (*b*) and (*d*) may require a word of explanation. Take clause (*b*). Then, as defined above, the father's maternal aunt's son is one of the father's *bandhus*; and the rule excludes his female descendants within the seventh degree. It also excludes the female descendants (within the same degree) of each of his six ancestors in a certain line,—namely, that in which those female descendants are connected by blood with the intending husband. This line must therefore, be the *bandhu's* maternal line, for his paternal line is not connected by blood with the bridegroom; and the six ancestors in question would be the *bandhu's* mother, his maternal grandfather, maternal great grandfather, &c., and not the *bandhu's* mother, his mother's mother, &c.; for though these females are connected by blood with the bridegroom, a line of female ancestors is not regarded as a line in the Hindu law. The same is to be understood in the case of any other *bandhu*, whether of the father or of the mother.

Clauses (*b*) and (*d*) may be illustrated by the following diagram, where A is the bridegroom; M and F with the several suffixes denote males and females respectively, M 1 and F1 being the father and the mother of A; and B1, B2, B3, denote the three *bandhus* of the father, and B′, B″, B‴ the three *bandhus* of the mother. The girls prohibited under clauses (*b*) and (*d*) would be the female descendants (within the seventh degree) of B1, B2, B3, and of each of their six ancestors that are represented in the scheme; and the female descendants (within the fifth degree) of

* *Ibid*, p. 66.

B′, B″, B‴, and of each of their four ancestors that are represented there.



It will be seen from the above, that in Rule I, the exclusion of collateral relations from eligibilty for marriage is carried rather too far, and intermarriage is prohibited between relations who may be practically regarded as strangers. Consequently, that rule has been qualified by the following exceptions :—

Exception I.—A girl who is removed by three *gotras* from the bridegroom is not unmarriageable, though related within the seven or five degrees above described.*

The three *gotras* in the case of the descendants of a *bandhu* are always to be counted from his (*bandhu's*) own *gotra*. So also, in the case of the descendants of the ancestors of a *bandhu*, who is the father's or the mother's maternal uncle's son, they are to be counted from the *bandhu's* own *gotra*. But in the case of the descendants of the ancestors of each of the other *bandhus*, the three *gotras*, are to be counted from his (*bandhu's*) maternal grandfather's *gotra*.

This exception is based upon a text of Brihat Manu, and another of the Matsya Purana, cited in the Udvahatattwa.†

* Raghunandaun's Inst. Vol, II, p. 64. † *Ibid.*

To understand it, you must bear in mind that marriage effects change of *gotra* in a female by transferring her from her father's *gotra* to that of her husband. The exception may be illustrated by the following example :——Suppose the paternal great grandfather of the bridegroom to be of the *Sandilya gotra* ; his daughter (by transfer by marriage) to be of the *Kasyapa gotra ;* her daughter, of the *Vatsya gotra* ; and this daughter's daughter to be of the *Bharadwaja gotra:* the maiden daughter of this last, being of the *Bharadwaja gotra,* and being beyond three *gotras viz,* the *Sandilya, Kasyapa* and *Vatsya,* is eligible for marriage, though within the prohibited degrees in Rule I (*a.*)

Exception II....When a fit match is not otherwise procurable, the Kshatriyas in all the forms of marriage, and the other classes in the *Asura* and other inferior forms of marriage, may marry within the above degrees, provided that they do not marry within the fifth degree on the father's side, and the third degree on the mother's.

This exception is based on the authority of Sulpani, but Raghunandana differs from him. It is, however, supported by a text of Paithinasi and another of Sakatayana, and is generally considered to be a valid exception.*

Besides those two, various other exceptions have been introduced, and they are all regarded as valid if sanctioned by custom, according to the doctrine of the *Chaturvingsati,* or the twenty-four sages.† Thus, in the South of India, intermarriage with the daughter of a maternal uncle is not only allowed, but is considered desirable.‡

In the case of a person whose filial relation has been changed by adoption, as well as in the case of his descendants, while the above rules about prohibited degrees continue in full force with reference to their relations by consanguinity,

* Shama Charan's Vyavastha Darpana, pp. 663, 664.
† *Ibid,* p. 664.
‡ 2 Strange's Hindu Law, p. 165.

the same rules apply with regard to relations in the families of the adoptive parents in the same way as if the adopted son were their legitimate son.* There may, however, be some difficulty in fixing the maternal line by adoption. If the adopting father has only one wife, she is considered the adoptive mother; if he has more wives than one, but joins with one of them only in the ceremony of adoption, or if only one of them takes the child with his permission, then, too, she is considered as the mother by adoption. But where the adopter has several wives, and does not join with any one of them in the act of adoption, it is not settled which of them is to become the adoptive mother, though some maintain that they all equally become his mothers, and that, consequently, he must have as many maternal lines as there are mothers.†

The rules as to prohibited degrees, subject of course to the exceptions noticed above, are absolutely imperative in their nature, and would nullify any marriage contracted in contravention of them.‡

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* Dattaka Chandrika, Sec. IV. 7—9.

† Colebrooke's Digest, Bk. V. 273. commentary, Vol. II. p. 894 (Madras edition); Shama Charan's Vyavastha Darpana, p. 890; see also Dattaka Mimansa, Sec. VI, 50—53.

‡ Udvahatattwa, Institutes of Raghunandana, Vol. II. p. 82; Kulluka Bhatta's Commentary on Menu, Ch. III, 5 and 11.

EXCLUSION FROM INHERITANCE.

(Cowell's Hindu Law, vol. ii., pp. 184—5.)

The doctrines of the Mitakshara and the Dayabhaga appear to rest upon the same footing with respect to the exclusion of certain persons from all participation in the ancestral estate and from the right of succession by inheritance. The author of the first-mentioned treatise refers to them by way of stating an exception or specified exceptions to the order of succession. He quotes* and explains the text of Yajnavalkya: "An impotent person, an outcast and his issue, one lame, a madman, an idiot, a blind man, and a person afflicted with an incurable disease, as well as others (similarly disqualified), must be maintained; excluding them, however, from participation." They are debarred from their shares, if their disqualification arose before the division of the property, but one already separated from his co-heirs is not deprived of his allotment.

And again, in the fifth chapter of the Dayabhaga, those persons who are incompetent to inherit are also specified, the purpose of the author being expressed by him to be to make known the competent heirs by means of the exceptions. A text of Apastamba is cited; "All co-heirs who are endued with virtue are entitled to the property." The explanation is given by the same sage,—*viz.*, "A son who deligently performs the obsequies of his father and other ancestors is of approved excellence, even though he be uninitiated; not a son who acts otherwise, be he conversant even with the whole Veda." His connection with the property is declared to be the reward of acts beneficial to his father. The disqualified persons are enumerated by Menu,†—*viz.*, impotent persons, outcasts, persons born blind and deaf, madmen, idiots, dumb,

* Mitakshara, chap. ii., sec. 10, verse i.
† 9 Menu, p. 201.

and those who have lost a sense or a limb. Food and raiment should be given to them,* except to the outcast and his son begotten after his degradation; but the sons of disqualified persons being free from similar defects shall obtain their father's share of the inheritance.

(*Strange's Hindu Law, Mayne's Introduction, p. xxxi.*)

The Hindu law, as we have remarked, was in its very essence founded upon the Hindu religion. Hence it followed that an abandonment of the religion, or the loss of its privileges by becoming an outcast, deprived the offender of all the benefits which he would obtain by means of it. Now, however, by reason of the passing of Act XXI. of 1850, it is quite plain that where a particular act entails degradation from caste, that degradation is not in itself a ground of disinheritance. Sometimes, however, it happens that a particular act, which would justify exclusion of caste, is also considered so heinous as to be a ground of disability to inherit even independently of the exclusion. Such a case would not be relieved by the Act just cited. An instance of this occurred in S. A. S. No. 40. of 1858, decided by the Madras Court of Sudder Adawlut. There a party sued for a share of his inheritance. He was met by the objection that he had been previously convicted of attempting to defraud his brother of part of the property, and of a burglary committed in pursuance of that attempt. It was held that this crime was in itself a bar to inheritance under Hindu law, quite independently of any exclusion from caste consequent thereon, and the objection to his suit was upheld.

* Dayabhaga, chap. iv., verse iii.

[*Shama Churn Sircar's Vyavastha Darpana.*]

Vyavastha 618.—A person degraded* (fallen) for sin, an outcast, his issue, a hypocrite or a person wearing the token of religious mendicity, one who has assumed another order, an impotent person, one born blind or deaf, one lame, a mad man, an idiot, one dumb, a person afflicted with an incurable or obstinate and agonizing disease, he who has lost the use of a limb, an enemy to his father, a person addicted to vice or expelled from society, are excluded from inheritance.

The heinous crimes are as follow :——

"Killing a Brahmin, drinking forbidden liquor, stealing (gold from a priest), adultery with the wife of a father, natural or spiritual, and associating with such as commit those offences, wise legislators must declare to be crimes in the highest degree." (*Menu*, chap. xi., verse 55.)

The crimes nearly equal to those in the highest degree are as follow :——

"False boasting of a high tribe, malignant information before the king of a criminal (*who must suffer death*), and falsely accusing a spiritual preceptor, are crimes (*in the second degree*) and nearly equal to killing a Brahmin. Forgetting the texts of scripture, showing contempt of the *Veda*, giving false evidence (*without a bad motive*), killing a friend (*without malice*), eating things prohibited, or, from their manifest impurity, unfit to be tasted, are six crimes nearly equal to drinking spirits. To appropriate a thing deposited (*or lent for a time*), a human creature, a horse, precious metals, a field, a diamond or any other gem, is nearly equal to stealing the gold (*of a Brahmin*). Carnal commence with sisters by the same mother, with little girls, with women of

* 'Degraded,'—that is, excommunicated—for a heinous crime, or for crimes in the second or third degree. [See Colebrooke's Digest, vol. iii., p. 304.]

Degradation takes place in the case of a heinous crime once consciously or twice unconsciously committed.

the lowest mixed class, or with wives of a friend, or of a son, the wise must consider as nearly equal to a violation of the paternal bed. (*Menu*, chap. xi., verses 56—59.)

These crimes—whether perpetrated consciously or unconsciously—cause degradation generally by the commission (of any of them) more than once. *Vide Prayashchitta-tattwa* and *Prayashchitta-Vivek*.

A sinner in the third degree is only excluded from participation in the case of repeated offences: (*such*) crimes are therefore mentioned in the plural number. (*Colebrooke's Digest*, vol, iii., p. 304.)

The crimes in the third degree are as follow:—

Slaying a bull or cow, sacrificing what ought not to be sacrificed, adultery, selling one's self, deserting a preceptor, a Mother, a father, or a son, omitting to read the scripture, and neglect of the fires *prescribed by the Dharmashastra only;*—the marriage of a younger brother before the elder, and that elder's omission to marry before the younger, giving a daughter to either of them, and officiating at their nuptial sacrifice;—defiling a damsel, usury, want of perfect chastity in a student, selling a holy pool or garden, a wife, or a child;—omitting the sacred investiture, abandoning a kinsman, teaching the *Veda* for hire, learning it from a hired teacher, selling commodities that ought not to be sold;—working in mines of any sort, engaging in *dykes bridges*, or *other* great mechanical works, spoiling medicinal plants (repeatedly), subsisting by the *harlotry of* a wife, offering sacrifices and preparing charms to destory (the innocent);—cutting down green trees for firewood, performing holy rites with a selfish view merely, and eating prohibited food (once without previous design);—neglecting to keep up the consecrated fire, stealing *any valuable thing besides gold* non-payment (*of the three*) debts, application to the books of a false religion, and excessive attention to music or dancing;—

stealing grain, base metals, or cattle, familiarity (*by the twice-born*, with women who have drunk inebriating liquor, killing without malice a woman, a *Shudra*, *Voishya*, or a *Kshatriya*, and denying a future state of rewards and punishments, are all crimes in the third degree (but higher or lower according to circumstances).—(*Menu*, chap. xi., verses 60—67.)

FUNDAMENTAL PROPOSITIONS OF THE DOCTRINE OF CAKES.

(*Krishna Kamal Bhattacharjea on some Unsettled Questions of Succession under the Bengal School of Hindu Law. preface.*)

1. A male person offers cakes to his father, grandfather, and great-grandfather in the paternal line, and also to his mother's father, grandfather and great-grandfather in the maternal line.

2. A is said to be sapinda to B if he gives pinda or cakes to B, if he receives cakes from B, or if both A and B give cakes to a common ancestor C.

Rules laid down by the late Justice D. N. Mitter.

1. Among sapindas, those who are competent to offer funeral cakes to the paternal ancestors of the deceased proprietor, are invariably preferred to those who are competent to offer such cakes to his maternal ancestors only, for the first kind of cakes are of superior religious efficacy in comparison with the second.

2. Those who offer a larger number of cakes of a particular description are preferred to those who offer a less number of cakes of the same description.

3. Where the number of such cakes is equal, those that are offered to nearer ancestors are preferred to those offered to more distant ones.

SAPINDA, DEFINITION OF.

(Sarvadhikari, p. 595.)

The word *sapinda* has been the subject of many a hard-fought fight. In the history of this word is wrapped up the whole history of the law of inheritance. Whether 'pinda' in the compound word 'sapinda, should mean *body*, or whether it should mean *oblations*, has been the subject of warm discussion among Hindu lawyers. To Gautama, Baudhayana, and the other ancient legislators, it mattered very little whether *pinda* signified 'body' or oblations. I say it mattered very little to them whether the *sapinda* relationship was based upon 'consanguinity,' or upon "the competence to perform exequial ceremonies," because those who were bound by ties of blood lived within the same family precints, and were bound also to offer those holy *pindas* which spiritually benefited the deceased.

The definition of a sapinda may be stated in three separate propositions.

I. A is sapinda to B, if A gives pinda to B.

II. A is sapinda to B, if A receives pinda from B.

III. A is sapinda to B, if both give pinda to a common ancestor C.

All the immediate sapindas become so, in accordance with the Proposition I.

Nos. 1, 8, and 15 out of the sapindas on both the father's side, and the mother's side, become so in accordance with the Proposition II.

All the rest of the sapindas on both the father's and the mother's side, acquire that relationship by virtue of the Proposition III.

TABLE OF SAPINDAS SHOWING THE AMOUNT OF SPIRITUAL BENEFIT CONFERRED BY EACH.

(Krishna Kamal Bhattacharjea on some Unsettled Questions of Succession under the Bengal School of Hindu Law, Appendix I.)

N. B.—Pindas or cakes may be characterized as of three kinds. When A gives pinda directly to B, as a son to his father, grandson to his grandfather, &c., there the pinda may be said to be a direct one; when A only shares with another ancestor pindas given by a third to that ancestor, there the pindas may be said to be shared by A; for example, A shares pindas given by his brother to his father.

Pindas are called secondary, when they are given to the maternal ancestors of the giver.

IMMEDIATE SAPINDAS.

1. Son gives 1 pinda direct, and 2 shared.
2. Grandson 1 „ „ 1 „
3. Great-grandson 1 „ „ none „
4. Daughter's son 1 direct, but secondary, and 2 shared but secondary.
5. Son's daughter's son, 1 direct secondary, 1 shared secondary.
6. Grandson's daughter's son, 1 ditto. none ditto.

SAPINDAS OF THE FATHER'S SIDE.

1. Father ... none direct, 2 shared.
2. Brother ... ditto 3 ditto.
3. Brother's son ... ditto 2 ditto.
4. Brother's son's son ... ditto 1 ditto.
5. Father's daughter's son ... ditto 3 ditto secondary.
6. Brother's daughter's son ... ditto 2 ditto ditto.

7. Brother's son's daughter's son ditto 1 shared secondary.
8. Grandfather ... ditto 1 ditto ditto
9. Father's brother ... ditto 2 ditto ditto
10. Father's brother's son ... ditto 2 ditto ditto.
11. Father's brother's son's son ... ditto 1 ditto ditto.
12. Grandfather's daughter's son ditto 2 ditto ditto.
13. Father's brother's daughter's son ... ditto 2 ditto ditto.
14. Father's brother's son's daughter's son ... ditto 1 ditto ditto.
15. Great-grandfather ... ditto none shared.
16. Grandfather's brother ... ditto 1 shared.
17. Grandfather's brother's son ... ditto 1 ditto.
18. Grandfather's brother's son's son ... ditto 1 ditto.
19. Great-grandfather's daughter's son ... ditto 1 ditto secondary.
20. Grandfather's borther's daughter's son ... ditto 1 ditto ditto.
21. Grandfather's brother's son's daughter's son ... ditto 1 ditto ditto.

As regards sapindas on the mother's side, none of the pindas given by them are shared by the last owner; in their case, the consideration is, how many pindas given by them are such as the deceased would have given on his own part. Therefore, against the name of each sapinda, we place a figure to indicate the number of persons who are the common recipients from that particular sapinda and the deceased.

SAPINDAS ON THE MOTHER'S SIDE:

1. Mother's brother ... ... 2 pindas that deceased would give
2. Mother's father ...
3. Mother's brother's son

4.	Mother's brother's son's son ...	1	
5.	Mother's sister's son ...	3	secondary.
6.	Maternal uncle's daughter's son	2	ditto.
7.	Maternal uncle's son's daughter's son ...	1	secondary.
8.	Mother's grandfather ...	1	pinda given by the deceased.
9.	Mother's father's brother ...	2	
10.	Mother's father's brother's son...	2	given by the deceased.
11.	Mother's father's borther's son's son ...	1	ditto.
12	Mother's grandfather's daugter's son ...	2	secondary.
13.	Mother's father's brother's daughter's son ...	2	ditto.
14.	Mother's father's brother's son's daughter's son ...	1	ditto.
15.	Mother's great-grandfather ...	None; but receives a pinda and is therefore a sapinda.	
16.	Mother's grandfather's brother gives ...	1	pinda given by the deceased.
17.	Mother's grandfather's brother's son ...	1	
18.	Mother's grandfather's brother's son's son ...	1	
19.	Mother's great-grandfather's daughter's son ...	1	secondary.
20.	Mother's grandfather's brother's daughter's son ...	1	ditto.
21.	Mother's grandfather's son's daughter's son ...	1	ditto.

PERFORMANCE OF SRADDHA RITES.

(Sárvadhikári, pp. 114-115)

BENARES SCHOOL.

Persons competent to celebrate Sraddha rites:

1. Son.
   - *a.* Eldest son.
   - *b.* Second son, &c.
   - *c.* Adopted son.
2. Grandson.
3. Great grandson.
4. *Widow.*
5. *Daughter.*
   - *a.* Married.
   - *b.* Unmarried.
6. Daughter's son.
7. Brother.
   - *a.* Whole brother.
     1. Younger.
     2. Elder.
   - *b.* Half-brother.
     1. Younger.
     2. Elder.
8. Brother's son.
9. Father.
10. *Mother.*
11. *Son's widow.*
12. *Sister.*
13. Sister's son.
14. Sapindas *ex parte paterna.*
    - *a.* Uncle.
    - *b.* Uncle's son, &c.
15. Samanodakas.
16. Sagotras, or kinsmen bearing the same family name.
17. Sapindas *ex parte materna.*
    - *a.* Maternal grandfather
    - *b.* Maternal uncle.
    - *c.* His son, &c.
18. Bandhus:
    - *a.* Father's sister's son.
    - *b.* Mother's " "
19. Father's Bandhus.
    - *a.* Father's father's sister's son.
    - *b.* " mother's sister's son.
    - *c.* " maternal uncle's son.
20. Mother's Bandhus.
    - *a.* Mother's father's sister's son.
    - *b.* " mother's sister's son.
    - *c.* " maternal uncle's son.
21. Strangers.
    - *a.* Pupil.
    - *b.* Son-in-law.
    - *c.* Father-in law.
    - *d.* Friend.
    - *e.* KING, except of a Brahmana.

The rules in the case of female kinsmen are different.

(Sarvadhikara, pp. 119–123.)

The rules determining the competency to perform the obsequial rites in the Bengal school, are not materially different from those obtaining in the Benares school. The following table compiled from Bhavadeva's Treatise* on Sraddha Rites, will give a clear idea about them :

BENGAL SCHOOL.

SRADDHA.

a.—*Parvana, or ancestral.*

b.—*Ekoddishta or individual*

a....PARVANA.

1. Son.
2. Grandson.
3. Great grandson.
4. Daughter's son.
5. Son's daughter's son.
6. Grandson's daughter's son.

b....EKODDISHTA.

1. Son.
   - *a.* Eldest Son.
   - *b.* Youngest Son.
2. Grandson.
3. Great grandson.
4. *Widow.*
   - *a.* Having no son.
   - *b.* Mother of a disqualified son.
5. *Daughter.*
   - *a.* Maiden.
   - *b.* Betrothed
   - *c.* Married.
6. Daughter's son.
7. Brother.
   - *a.* Youngest uterine brother.
   - *b.* Eldest.
   - *c.* Youngest stepbrother.
   - *d.* Eldest.

* Bhavadeva, Cal. Ed., 348.

8. Brother's son.
   a. Son of youngest uterine brother.
   b. „ „ eldest „ „
   c. „ „ youngest stepbrother.
   d. „ „ eldest „
9. Father.
10. *Mother.*
11. *Son's widow*
12. „ *daughter.*
13. „ „ *married.*
14. *Grandson's widow.*
15. „ *daughter.*
16. *Grandson's daughter married.*
17. Grandfather.
18. *Grandmother.*
19. Sapindas *ex parte paterna.*
    Uncles and others.
20. Samanodakas *ex parte paterna.*
21. Sagotras (or kinsmen of the same family name.)
22. Maternal grandfather.
23. *Maternal grandmother.*
24. Maternal uncle.
25. Sister's son.
26. Sapindas *ex parte materna.*
27. Samanodakas „
28. *Widow belonging to a different caste.*
29. *An unmarried woman living as wife.*
30. *Father-in-law.*
31. *Son-in-law.*
32. *Grandmother's brother.*
33. Strangers.
    a. Pupil.
    b. Priest.
    c. Spiritual preceptor.
    d. Friend.
    e. Father's friend.
    f. Servants of the same caste living in the same village.

The list given by Bhavadeva is essentially the same as that given by Rughunandana. The two authorities differ, however, with regard to the competency of the *maternal grandmother* and *great grandsons widow* to perform these sacred rites. Raghunandana denies this privilege to the former and Bhavadeva to the latter.*

* The following persons are competent, according to Raghunandana, to offer the exequial cake in the Bengal School :—

1. Eldest son.
Youngest son.
Grandson.
Great grandson.
Widow having no son.
Widow, mother of a disqualified son.
Maiden daughter.
Betrothed daughter.
Married daughter.
10. Daughter's son.
Youngest uterine brother.
Eldest uterine brother.
Youngest stepbrother.
Eldest stepbrother.
Son of youngest uterine brother.
Son of eldest uterine brother.
Son of youngest stepbrother.
Son of eldest stepbrother.
Father.
20. Mother.
Daughter-in-law.
Son's unmarried daughter.
Son's daughter, married.
Grandson's widow.
Grandson's daughter.
Grandson's son's widow (?)
Grandfather.
Grandmother.
30. Paternal uncle, and other Sapindas, *ex parte paterna.*
Samanodakas, *ex parte paterna.*
Sagotras (kinsmen bearing the same family name.)
Maternal grandfather.
Maternal uncle.
Sister's son.
Sapindas, *ex parte materna.*
Samanodakas, *ex parte materna.*
Widow belonging to a different caste.
An unmarried woman living as wife.
40. Father-in-law.
Son-in-law.
Brother of grandmother.
Pupil.
Priest.
Spiritual preceptor.
Friend.
Father's friend.
48. Servants of the same caste living in the same village.

These forty-eight persons are entitled to perform the exequial ceremonies of a deceased kinsman.

The following persons are competent, in the Bengal School, to perform the funeral ceremonies in honor of a deceased kinswoman :—

1. Eldest son.
Youngest son.
Grandson.
Great-grandson.
Maiden daughter.
Betrothed daughter.
Married daughter.
Daughter's son.
Son of a rival wife.
10. Husband.
Daughter-in-law.
Husband's sapindas, *ex parte paterna.*
Samanodakas of the husband, *ex parte paterna.*
Sagotras, kinsmen bearing the family name of the husband.
Father.
Brother.
Sister's son.
Husband's sister's son.
Brother's son.
20. Son-in-law.
Husband's maternal uncle.
Husband's pupil.
Father's samanodakas, kinsmen of the father's family; mother's samanodakas, kinsmen of the mother's family.
24. Learned Brahmins.

Twenty-four only.*

* Raghunandana, Suddhi Tatwa, 491.

(Sarvadhikari, pp. 861—5.)

INHERITANCE UNDER THE BENARES SCHOOL.

1. Son.
2. Grandson.
3. Great grandson.
4. *Widow.*
5. *Daughter.*
   - *a.* Unmarried.
   - *b.* Married.
     1. Unprovided.
     2. Enriched.
6. Daughter's son.
7. *Mother.*
8. Father.
9. Brother.
   - *a.* Whole brother.
     1. Associated.
     2. Unassociated.
   - *b.* Halfbrother.
     1. Associated.
     2. Unassociated.

An unassociated whole brother and an associated halfbrother share the estate equally.

10. Brother's son.
11. Sapindas *ex parte paterna.*
    - *a.* *Grandmother.*
    - *b.* Grandfather.
    - *c.* Uncle and other sapindas up to the seventh degree.
12. SAMANODAKAS.

Bandhus.

- *a.* His own.
- *b.* Father's.
- *c.* Mother's.

14. Strangers.
    - *a.* Pupil.
    - *b.* Fellow-student.
    - *c.* Learned priest.
    - *d.* Any Brahmana.
    - *e.* KING.

INHERITANCE UNDER THE BENGAL SCHOOL.

1. Son.
2. Grandson.
3. Great grandson.
4. *Widow.*
5. *Daughter.*
   - *a.* Unmarried.
   - *b.* Having or likely to have male issue.
6. Daughter's son.
7. Father.
8. *Mother.*
9. Brother.
   - *a.* Whole brother.
     1. Associated.
     2. Unassociated.
   - *b.* Halfbrother.
     1. Associated.
     2. Unassociated.

An associated halfbrother inherits with unassociated whole brother.

10. Brother's son.
    1. Of whole blood.
    2. Of half ,, &c.
11. Brother's grandson.
12. Sister's son.
13. Grandfather & great grandfather, with their lineal descendants including daughter's son.
14. Maternal kindred.
    a. Grandfather.
    b. Uncle, &c.
15. Sakulyas (or distant kinsmen).
16. Samanodakas (or remote kindred)
17. Strangers.
    a. Spiritual preceptor.
    b. Pupil.
    c. Fellow-student.
    d. Sagotra *or persons bearing the same family name)* inhabiting the same village.
    e. Persons descended from the same patriarch, and living in the same village.
    f. Priests.
    g. KING.

TABLE OF SUCCESSION IN ACCORDANCE WITH THE RULES LAID DOWN BY MR. JUSTICE DWARKA NATH MITTER IN THE CASE OF GURU GOBINDO SHAHA 13 W. R. F. B. 49.

(Krishna Kamal Bhattacharja, p. ix.)

1. Son.
2. Grandson.
3. Great-grandson.
4. Widow.
5. Unmarried daughter
6. Married daughter, having or likely to have a son.
7. Daughter's son.
8. Father.
9. Mother.
10. Re-united whole brother.
11. Un-re-united whole brother and re-united half-brother. together.
12. Un-re-united half-brother.

13. Brother's son.*
14. Brother's son's son.†
15. Father's daughter's son, or the son of a sister whole or half.
16. Son's daughter's son.
17. Brother's daughter's son.
18. Son's son's daughter's son.
19. Brother's son's daughter's son, whether the brother be whole or half.
20. Grandfather.
21. Grandmother.
22. Father's whole brother.‡
23. Father's half-brother.
24. Father's whole brother's son.
25. Father's half-brother's son.
26. Father's whole brother's son's son.
27. Father's half-brother's son's son.
28. Grandfather's daughter's son, whether it be the whole or half sister of the father.
29. Father's brother's daughter's son, whether the whole or half.
30. Father's brother's son's daughter's son, whether the brother be whole or half.
31. Great-grandfather.
32. Great-grandmother.

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* The internal arrangement as among the different kinds of brother's sons is as follows:—
(*a*) Re-united whole brother's son.
(*b*) Un-re-united half-brother's son and re-united whole brother's son together.
[*c*] Un-re-united half-brother's son.

† The internal arrangement as among different kinds of brother's son's sons is as follows:—
[*a*] Whole brother's son's son.
[*b*] Half-brother's son's son.

‡ As among father's brothers also, the rule determining the preferential right on the ground of re-union is to be applied, as in the case of one's own brethren.

33. Grandfather's whole brother.
34. Grandfather's half-brother.
35. Grandfather's whole brother's son.
36. Grandfather's half-brother's son.
37. Grandfather's whole brother's son's son.
38. Grandfather's half-brother's son's son.
39. Grandfather's sister's son, whether the sister be whole or half.
40. Grandfather's brother's daughter's son, whether the brother be whole or half.
41. Grandfather's brother's son's daughter's son, whether the brother be whole or half.
42. Mother's father, or maternal grandfather.
43. Mother's brother, whole or half, or maternal uncle.
44. Maternal uncle's son.
45. Maternal uncle's son's son.
46. Mother's sister's son, whether the sister be whole or half,
47. Mother's brother's daugdter's son, whether the brother be whole or half.
48. Mother's brother's son's daughter's son, whether the brother be whole or half.
49. Mother's father's father.
50. Mother's father's brother, whole or half.
51. Mother's father's brother's son, whole or half.
52. Mother's father's brother's son's son, whole or half.
53. Mother's father's sister's son, whether the sister be whole or half.
54. Mother's father's brother's daughter's son.
55. Mother's father's brother's son's daughter son.
56. Mother,s great-grandfather.
57. Mother's grandfather's brother, whole or half.
58. Mother's grandfather's brother's son, whole or half
59. Mother's grandfather's brother's son's son, whole or hal.
60. Mother's grandfather's sister's son, whole or half.
61. Mother's grandfather's brother's daughter's son.

62. Mother's grandfather's brother's son's daughter's son

Then come Sakulyas, as follows...

63. Great-grandson's son.

64. Great-grandson's son's son.

65. Great-grandson's great-grandson.

66. Great-grandfather's father.

67. Descendants of No. 66, in the male line as far as the sixth degree; the degrees are to be counted excluding himself. Then such of the descendants of No. 66, in the female line, as offer pinda to him.

68. Then great-grandfather's grandfather and his descendants of the same kind as those of N. 66, both in the male and in the female line.

69. Great-grandfater's great-grandfather and his descendants of the same kind as those of No. 66, both in the male and in the female line.

Then the Samanodakas, viz :—

70. The seventh ancestor from the deceased, counting his father as one.

71. Then the descendants of No. 70, in the male line and such descendants of the daughter's son kind, as offer pinda to No. 70.

So on as far as relationship with the deceased can be traced,

N. B.—The Sakulya relationship extends as far as the sixth degree of ascent or descent.

See Dáyabhága, ch. xi., s. vi., para. 21.

The Samanodaka relationship extends so far as common descent can be traced. See Vrihanmanu quoted in the Mitakshara, ch. ii., s. v., para. 6,

Lastly come the specified strangers.

INHERITANCE UNDER THE BENGAL SCHOOL.

(Sreenath Beneriee)

1. Son.
2. Grandson.
3. Great-grandson,

* Confer benefit from the moment of their birth.

4. Widow.
5. Daughter.

† Females are incompetent to make *parvana chradh*; but can offer funeral fire, ten *pindas*, first *shradh*, twelve monthly *pindas*, *sapinda-karan*, and *ekoddista shradh*.

6. Daughter's son.‡
7. Father.‖
8. Mother.
9. Brother.
10. ——'s son.
11. ——'s grandson.
12. Father's daughter's son.
13. Grandfather.
14. Grandmother.
15. Uncle.
16. ——'s son.
17. ——'s grandson.
18. Grandfather's daughter's son.
19. Great-grandfather.
20. Great-grandmother.
21. Father's uncle.
22. ——'s son.
23. ——'s grandson
24. Great-grandfather's daughter's son.
25. Son's daughter's son.
26. Grandson's daughter's son
27. Brother's daughter's son.
28. Brother's son's daughter's son.
29. Uncle's daughter's son.
30. Uncle's son's daughter's son.
31. Father's uncle's daughter's son.
32. Father's uncle's son's daughter's son."

‡ Nearer *sapindas* of a different family can offer funeral fire, ten *pindas*, first *shradh*, twelve monthly *pindas*, *sapindakaran* and *ekoddista shradh* with single oblation in *parvana shradh*.

‖ Can offer funeral fire, ten *pindas*, first *shradh*, twelve monthly *pindas*, *sapindakaran*, and *parvana shradh* with double oblations to his ancestors which the deceased was bound to offer.

TABLE OF THE ORDERS OF SUCCESSION TO THE DIVERSE DESCRIPTIONS OF STRIDHAN.

(Shama Churn Sircar's Vyavastha Darpana, p. 822.

ORDER OF SUCCESSION TO THE PECULIUM OF AN UNMARRIED DAUGHTER.

1. THE WHOLE BROTHER 2. THE MOTHER. 3. THE FATHER.

Failing these, her parent's relations, as they happen to be, succeed according to the order of succession to a childless woman's property, *q. v.*

To a betrothed girl's property given by her to her husband,—First, the husband succeeds; in his default, the above-mentioned heirs succeed according to the above order.

ORDER OF SUCCESSION TO THE STRIDHAN OF A MARRIED WOMAN HAVING CHILDREN.

To her property received at the time of her nuptials :—

1. The unmarried daughter not betrothed.
2. The betrothed daughter.
3. The daughter who has a son.
   The daughter likely to have a son.
4. The barren daughter.
   The (sonless) widowed one.
5. Son.
6. Daughter's son.
7. Son's son.
8. Son's grandson in the male line.
9. The son of a rival wife.
10. Her son's son.
11. Her son's grandson in the male line.

To that received at any time other than that of her nuptials :

1. Son.
   Unmarried daughter.
2. The daughter having a son.
   The daughter like to have a son,
3. Son's son.
4. Daughter's son.
5. Son's grandson in the male line.
6. The son of a rival wife.
7. Her son's son.
8. Her son's grandson in the male line,
9. The barren daughter.
   The (sonless) widowed daughter.

To that given by her father :—

1. The unmarried daughter.
2. Son.
3. The daughter having a son.
   The daughter likely to have son.
4. Daughter's son.
5. Son's son.
6. Son's grandson in the male line.
7. The son of a rival wife.
8. Her son's son.
9. Her son's grandson in the male line.
10. The barren daughter.
    The sonless widowed daughter.

ORDER OF SUCCESSION TO A CHILDLESS MARRIED WOMAN'S STRIDHAN.

Given by her parents before marriage, her fee or gratuity, or bestowed after marriage :—	*Other than that given by her parents, before marriage, her fee or gratuity, of bestowed after marriage.*	
	If married according to the Brahma, Daiva, Arsha, Prajapatya, or Gandharva form :—	*If married according to the Asura, Rákshasha, or Poishácha form :—*
1. The whole brother.	1. The husband.	1. The mother,
2. The mother.	2. The brother.	2. The father,
3. The father.	3. The mother.	3. The brother,
4. The husband.	4. The father.	4. The husband.

SUCCESSION OF HEIRS AFTER THOSE AFORSAID TO ANY DESCRIPTION OF PROPERTY OF A WOMAN MARRIED ACCORDING TO ANY OF THE EIGHT FORMS.

5. Husband's younger brother,	8. Her husband's sister's son.	12. The *Sakulyas.*
6. The sons of the husband's younger and elder brothers,	9. Her own brother's son,	13. *Samanodakas.*
7. Her sister's son.	10. Her son-in-law.	14. *Samana-gotras.*
	11. The *Sapindas.*	15. *Samana-pravaras.*

A SUMMARY OF THE LAW ABOUT STRIDHAN.

(Tagore Law Lectures, 1878, pp. 317-320.)

The modes in which a Hindu female may acquire property are gift, purchase (under which I include every mode of acquisition for valuable consideration), inheritance, and partition.

Gift.

A gift may be received either from a relation or from a stranger.

In the former case, the property given always ranks as *stridhan* according to all the schools. To this rule, the case of immoveable property given by the husband perhaps forms an exception under the Bengal law. But it is doubtful whether it is really an exception?*

In the latter case, except in the Benares and the Maharastra school, where all gifts constitute *stridhan*, the property given becomes *stridhan* only when received by a woman at the time of her marriage †.

A legacy is regarded in the light of a gift, and constitutes *stridhan* where a gift from the testator would have ranked as *stridhan* ‡.

Ornaments given by a man to his wife, or constantly worn by her with his permission, though belonging originally to him, become her *stridhan*.§

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* See Dayabhaga, Ch. IV, Sec. I, 21; Vivada Chintamani, p. 261; Macnaghten's Precedents of Hindu Law, Ch. I, sec. II, Case xiv; 2 Strange, 19. But see Dayabhaga, Ch. IV, Sec. I, 18; Colebrooke's Digest, Mad. edn., Vol. II, p. 626; and Venkata Rama Rau *v.* Venkata Surya Rau I. L. R., 1 Mad., 286.

† The texts require the gift to be made before the nuptial fire; but it seems that the presence of fire is not absolutely necessary; and so nuptial presents received from strangers by a girl married in the Brahmic form in which no fire is kindled, would, nevertheless, become her *stridhan*.

‡ See Ram Dulal Sircar *v.* Sreemutty Joymoney Dabey, 1 Morley, 65, Juddoo Nath Sircar *v.* Bussunt Coomar Roy Chowdhry, 19 W. R., 264.

§ Gun Joshee Malkoondkar *v.* Sugoono Bai, 1 Morley's Dig., 595; Stridhana pl. 3; 2 Strange's Hindu Law, 64—66; Smriti Chandrika, Ch. IX, Sec. II, 27, 28.

Gift to a widow in lieu of maintenance (which ought, properly speaking, to come under the head of purchase, being gift for valuable consideration) has been held to come within the definition of *stridhan*.*

Purchase.

Property acquired by purchase would include earnings or acquisitions by labor and skill, property bought for money, property acquired by exchange, and the like.

Wealth earned by a woman by the mechanical arts during coverture does not, except in the Benares and the Maharastra school, become her *stridhan*. But if earned during widowhood, or during maidenhood, it would be her *stridhan* under all the schools, as the text of Katyayana, which places such wealth under the control of the husband, would be inapplicable to such cases.

Property purchased by a woman with funds absolutely belonging to her, or obtained in exchange for other property which is her *stridhan*; is her *stridhan* according to all the schools, it being evident that though such property is not expressly mentioned as one of the different sorts of *peculium*, it is really her original *stridhan* transformed into another shape.† So also property obtained by a compromise in consideration of her giving up any rights in relation to her *stridhan* would be her *peculium*. But property acquired with the accumulations of the income of her husband's estate would not costitute her *stridhan*, but would form part of the *corpus* of that estate.‡ A distinction, however, has been drawn between property acquired with *accumulations* of the income, and that acquired out of *current*, that is the year's, income; and it has been held ‖ that

* Mussamut Durga Koonwar *v.* Mussamut Tejoo Koonwar, 5 W. R., Mis., 53; Nellaikumaru Chetti *v.* Marakathammal, I. L. R., 1 Mad., 166.

† See Luchmun Chunder Geer Gossain *v.* Kalli Churn Singh, 19 W. R., 292.

‡ See Chundrabulee Debia *v.* Mr. Brody, 9 W. R., 284; Mussamut Bhagbutti Dace *v.* Chowdry Bholanath Thakoor, 24 W. R., 168.

‖ Sreemutty Puddomonee Dossee *v.* Dwarkanath Biswas, 25 W. R., 535; see also Sreemutty Soorjoomoney Dossee *v.* Denobundoo Mullick, 9 Moo. I. A., 123; but see Gonda Kooer *v.* Kooer Oodey Singh, 14 B. L. R., 165.

over this latter description of property a widow has the same absolute right as over the income itself.

Where property had been inherited by a widow from her husband and afterwards confiscated by Government, such property, on being subsequently granted to the widow by a *sunnud* from Government, was held to rank as her *stridhan*.*

Inheritance.

As regards property acquired by inheritance, the decisions and the original authorities agree in laying down the rule that in Bengal it constitutes *stridhan* in no case, and that, according to the Bombay school, it becomes *stridhan* in all cases, except that of property inherited by a widow from her husband. The law of the other schools on this point, as expounded by a considerable body of decisions seems to agree with that of Bengal, as regards property inherited from males; but as regards property inherited from a female the law of those schools is not yet fully settled.

Partition.

The share which a woman obtains on partition is her *stridhan* according to the Benares and the Maharastra school, but it does not rank as *stridhan* according to the law of Bengal. The law of Mithila and that of Dravida are not very clear on the point, but there is reason for thinking that they do not differ from the law of Bengal.

Burden of proof where property is alleged to be *stridhan*.

As a consequence of the doctrine that only some particular descriptions of property belonging to a woman constitute her *stridhan*, it has been held that burden of proving that any property belonging to a woman is her *peculium* lies on the party making such special allegation.†

* See Brij Indur Bahadur Singh v. Ranee Janki Koer, 1 C. L. R., 318.
† Sreemutty Chundermonee Dossee v. Joykissen Sircar, 1 W. R., 107.

(*Tagore Law Lectures, 1878, pp. 330—331.*)

Husband's rights over wife's stridhan.

The right to use a woman's *stridhan* is personal in her husband.*. Accordingly it has been held that though the husband might have applied such property to the payment of a debt to procure his discharge from arrest in execution of a decree, his creditor has no right to seize it.†

So also, though the husband may use the wife's *stridhan* in order to relieve from distress any member of his family, such member has no right to use it for such purpose.

The question whether a woman has absolute power of alienation over her *stridhan* was considered by the High Court of Madras in *Doe dem Kullammál v. Kuppu Pillai*,‡ and the Court answered it in the affirmative. And though in a subsequent case‖ the Court remarked that, considering the perpetual dependence of women it could not, "without the greatest consideration, conclude that a woman can, without the consent of her husband, during coverture, absolutely alienate even her own landed property;" yet, considering that the authorities are clear on the point, and that the text of Katyayana cited above§ expressly gives to women the power of alienating immoveable property, there seems to be very little room for any doubt on the subject, as regards the *saudayika stridhan*.

In a still later case,¶ the Madras High Court has held, that the proposition that what is acquired by a woman during coverture belongs to her husband, has no foundation in Hindu law, and that the contrary of that proposition is unquestionably true.

Nor can the husband bind the wife by his dealings with her property. Thus, in a recent case** before the Privy Council, it was held that a husband could not affect his wife's rights over her property by any engagements he might enter into with reference to it.

In cases of dispute with the husband's creditors, the burden lies upon the wife to prove that any particular property is her *stridhan* and does not belong to her husband.††

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* Smriti Chandrica, Ch. IX. Sec. II, 17.
† 1 Strange, 27, 28; 2 *Ibid*, 23,24. ‡ 1 Mad. 85.
‖ Dantuluri Rayapparaz v. Mallapudi Rayudu, 2 Mad., 360.
§ See pp. 322, 323.
¶ Ramasami Padeiyatchi v. Virasami Padeiyatchi, 3 Mad., 278.
** Mohima Chunder Roy v. Durga Monee, 23 W. R., 184.
†† George Lamb v. Musst. Govind Money. S. D. A. R. (Beng), 1852 p. 125; Brojo Mohun Mytee v. Musst. Radha Koomaree. W. R. (1864) 60.

A SYNOPSIS,

OR,

GENERAL SUMMARY

OF THE

HINDU LAW OF ADOPTION.

(By J. C. C. Sutherland, Esq. Translator of the Dattaka Chandrika and the Dattaka Mimansa.)

THE *Hindu* Law of Adoption may be classified under the following heads.

1st. The qualification and right to adopt.

2nd. The qualification and right to be adopted.

3rd. The form to be observed in adoption, and the effect of its omission.

4th. The effects of adoption.

5th. Special rules.

It should be premised, that in the present age, amongst the various subsidiary sons* recognized in codes of law, according to the authority of writers, confirmed by practice, only those technically denominated, the son given *Dattáka* or *Dattrima)* and son made, *(Kritrima* or *Krita)* are capable of being affiliated†. The author of the *Dattáka Chandrika*, indeed admits the son given alone.—In effect however, without any great latitude, a son self given, and a son rejected, might perhaps be included‡ under the general denomination of the son made, the *Kritrima* or *Kritaputra* (vulgarly called *'Karta puter'*): and it should not be omitted, that in treatises of law, the term *Dattáka*, or son given is sometimes used to denote an adopted son generally.

v. D. M. Section I. Para 64. 65. v. D. Ch. Section I. Para 2.

*See those enumerated in a Note to Para 33, Sect. I. D. M.

† v. Notes I. and II. subjoined.

‡ v. Note III, subjoined.

HEAD FIRST.

The Qualification and Right to Adopt.

D. M. Sect. 1. Para 3. D. Ch. Sect. 1. Para 3.

The primary reason for the affiliation of son, being the obligatory necessity of providing for the performance of the exequial rites (*a*), celebrated by a son, for his deceased father, on which the salvation of a *Hindu* is supposed to depend, it

D. M. Sect. 1. Prra 6.

is necessary that the person proceeding to adopt, should be destitute of male issue, capable of performing those rites. By the term issue, the son's son, and grandson, are includ-

D. M. Sect. 1. Para 13. D Ch. Sect. 1. Para 6.

ed. It may be inferred, that if such male issue, although existing, were disqualified, by any legal impediment, (such as loss of caste,) from performing the rites in question, the affiliation of a son, might legally take place.

A doubt might be entertained,* as to the validity of an adoption, by one not being in the order of the *'Grihi'* (the house-holder or married man), or by a blind, impotent, or other person, disqualified from inheriting. The more cor-

D. Ch. Sect. VI.

rect opinion, however, appears to be, that an adoption, by any of the persons described, would be valid: though it seems reasonable, that the affiliation, of one excluded from inheritance, should confer no right of succession on the adopted, of which the adopter is debarred by law.

D. M. Sect. 1. Para 15. 9. D. Ch. Sect. 1. Prra 7.

The same reason, which imposes the necessity of adoption on a man, not equally applying to a woman, the latter, (at least such seems the more accurate and prevailing doctrine,) is incapable in her own right of adoption,† though, it is admitted that by his sanction,‡ she may affiliate on the part

D. Ch. Sect. 1. Para 24. D. M. Sect. 1. Para 15. et seq.

of her husband, a son who would necessarily be filially related to herself. NANDA PAN'D'ITA denies generally the authority of a widow to adopt, assigning a reason, by no means satisfactory, that the assent of her husband is impossible: but it

(*a*) See 4 Moore, I. A. Ca. 100.

* v. Note IV. subjoined.

† v. Note V. subjoined.

‡ v. Note VI. subjoined

is reasonable to admit, consistent with practice, and the opinion of other authors, the validity of an adoption made by a widow, under the sanction of her husband written or formally expressed during his life time, and perhaps, in some places under that of kinsmen (*b*).

HEAD SECOND.

The qualification and right to be Adopted.

THE first, and fundamental principle is, that the person proposed to be adopted, be one, who, by a legal marriage with his mother, might have been the legitimate son of the adopter. By the operation of this rule, a sister's son, and offspring of other female, whom the adopter could not have espoused, and one of a different class, are excluded from adoption. In the present age, marriage with one, unequal in class, is prohibited.

D. M. Sect. V. Para 16. et seq. D. Ch. Sect. II. Para 8.

NANDA PAN'D'ITA declares, that woman may not affiliate a brother's son: if his opinion be correct, it might be consistently argued, that, where a woman is proceeding to adopt with the sanction of her husband or kindred, she must not select generally, one with whose father she could not have legally married.

D. M. Sect. II. Para 33, 34.

It is an obvious inference, that the person selected should be exempt from any disqualification, which might prevent him fulfilling the purpose of the adoption.—It has been intimated by writers on law,* that proximity of kindred ought to determine the choice of an adopted son. But, though NANDA PAN'D'ITA extends this principle with elaborate minuteness, it can not be regarded, as a rigid maxim of law, vitiating the adoption of a remote, where a near kinsman,—or of a stranger, where a relative,—may exist. The right however, of a whole brother's son, to be adopted in preference to any other person, where no legal

D. M. Sect. II. Para II. 12. et seq.

D. M. Sect. II. Para 28. 37.

D. Ch. Sect. I. Para 20.

(*b*) So held in 2. Mad H. C. Rep. 206.

* VASISH'THA SAUNAKA.

*Mitakshara**. *Dwaita Nirnaya.* D. M. Sect. IV. Para 1.3. D. Ch. Sect. I. Para 29. D. Ch. Sect. III. Para 17. D. M. Sect. II. Para 37. 38. D. ch. Sect. I. Para 28. D. M. Sect. I. Para 30. D. M. Sect. II. Para 44.

impediment may obtain, seems to be generally admitted, and may be regarded as a received rule of law.

An only son† cannot become an absolutely adopted son (*Sud'ha-Duttáka*) but, he may be affiliated, as a *Dwyá-mushyáyna*, or son of two fathers. In this case the person of the prohibition,—viz. extinction of lineage to the natural father,—would not apply. An only son of a whole brother accordingly, if no other nephew exist for selection, must be adopted by his uncle, requiring male issue, and is son of two fathers. The same person can not be adopted by more than one individual, except in the case of one nephew, by several uncles, the whole brothers of his natural father. It may however be inferred, that a legal impediment would exist, to the affiliation, by an uncle of a nephew, whom his father had given away in adoption, as a '*Sud'ha-Duttáka*,' who retains no filial relation to his natural father.

To render the adoption valid and complete, it is necessary, that the person adopted should assent, or being a minor, be given by a competent party.‡ On the subject of the legal ability, to give a son in adoption, some difficulty exists in extracting a consistent doctrine.‖ The more correct opinion appears to be—1st. That, the father may give away his minor son without the assent of the mother, though it is more laudable that he should consult her wishes.—2nd, That, the mother generally is incapable of such gift while the father lives.—3rd. That, she, however, on her husband's death, may give in adoption her minor son, and even during the life of that person, in case of urgent distress and necessity. A man, who had permanently emigrated, entered a religious order, or become an outcast, being civilly dead, would be regarded as virtually deceased.

D. M. Sect. IV. Para 9, et seq. D. Ch. Sect. I. Para 7, 31. 32.

* Trans. on Inh. Chap. I. Sect. XI. § 36.
† Note VII. subjoined.
‡ v. Note VIII. subjoined.
‖ v. Note IX.

Discrepancy of doctrine amongst some writers, and the silence of others, have left doubtful, the determination of these questions;—1st. Whether the adoption of one, who has attained any particular age, is barred; 2nd. Whether the performance, in the family of the natural father, of any, and what particular initiatory rites, constitutes an insuperable objection to, being adopted.

On the subject of these questions, a passage attributed to the *kálika-puráṇa*, (the authenticity and meaning of which are contested) is usually cited*, According to JAGANNATHA, the compiler of the Digest, this constitutes an absolute prohibition, against any adoption whatsoever, of one, whose age exceeds five years, or on whom, the initiatory rite of tonsure (*a*), may have been performed in the family of his natural father†. And in a case‡ in which the adoption of one older than five years, was contended to be illegal, on the opinion of its *Pandits*,—declaring according to the *Hindu* law, as received in *Bengal*, the adoption of such person to be legal, provided, the initiatory rites (*sanskára*) in the family of the natural father have not been, and in that of the adopter be, performed—the *Sudder Dewání Adawlut* appears to have determined the following points, as applicable to *Bengal*, where it should be observed, the *Dattaka* form of adoption chiefly, if not solely, prevails.‖—1st. That, adoption is restricted to no particular age.—2nd, That, one initiated in tonsure in the name and family of his natural father, is incapable of adoption.—3rd. That, the age of the person selected for adoption, must be such, as to admit of the ceremony of tonsure being performed in the adopter's name and family.

* v. D. M. Sect. IV. Para 22; et D. Ch. Sect. II. Para 25.

† v. Digest Ch. IV Sect VIII.

‡ v. Printed reports on select cases.—KERUT NARAEN *versus* MT. BHOBIVESREE.—*Cause No. 22 of 1806.*

(*a*) See 1. Morl. Dig. 20, 21.

‖ v. Note X, subjoined.

The limitation of adoption to any particular age, is thus over-ruled: but without presuming to question, as applicable to *Bengal*, the accuracy of the other two points of law, resulting from the decision referred to, there is no impropriety in expressing a doubt, whether they can be received as constituting a general rule universally decisive on the questions, which they regard.—1st. Such rule would be at variance with the doctrines, of the *Dattaka Mimánsá* and *Dattaka Chandriká*, as detailed in a note subjoined.*—2nd. The authenticity of the passage, attributed to the *Kalika-purána*, on which the opinion of JAGANNATHA, and the *Pandits* of the *Sudder Dewani* is founded, is justly denied, and it is interpreted, as admitting the adoption of one, although initiated in tonsure, by his natural father,—3rd. The received definition of the *Kritrima* son, and particularly the mode of affiliation† current in the *Mait'hila* country, obviously refer to one of years somewhat mature, who, if not necessarily, would mostly, be initiated in tonsure, by his natural father: and the adoption of such person is certainly justified by practice, obtaining in some parts of *India*,

The difficulty or rather impossibility, of defining any unvarying principles, universally decisive on the questions referred to, is obvious. The most general and consistent rule, which presents itself, is this‡.—Any person, on whom the adopter may legally perform, the *Upanayana* rite,‖ is capable of being affiliated as a *Dattaka* son: while one, not so qualified, may be lawfully adopted as a *Kritrima* son.

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* Note XI.

† See that propounded by *Rudra Dhára* in Note XVI.

‡ v. Note XII. subjoined.

‖ For the rules, performing the rite of *Upanayana*, consult R. Ch. Note to Sect. II. Para 31: and for the designation and order, of the different initiatory rites, see D. M. Note to Sect. VI Para 23.

HEAD THIRD.

The form to be observed in Adoption, and the effects of its Omission.

REGARDING the mode of adoption, a text of VASI'SHT'HA, is most usually cited. This enjoins, that, the party proceeding to adopt, should previously give notice to the ruling power (*Rájá*), and after having invited kinsmen, should complete the adoption, by the observance of the prescribed solemnities, viz. a burnt sacrifice, and recitation of the prescribed prayers. The forms, propounded at greater length by SAJNAKA, VIRDD'HA GAUTAMA, BAUD'HÀYANA, and other primitive writers, essentially conform with his of VÁSISHT'HA. The former provide for the attendance of *Brahmanas*, and an officiating priest, to demand the son to be given.

v. D. M. Sect. V. Para 31.

D, M. Sect. V. D. Ch. Sect. II.

The expression '*Rájá*' has been explained by commentators, to signify the chief of the town or village. They seem however agreed,* that, the notice enjoined, and the invitation of kinsmen, are no legal essentials to the validity of the adoption, being merely intended, to give greater publicity to the act, and to obviate litigation, and doubt, regarding the right of succession.

D. Ch. Sect. II. Para 6.

The form propounded by VÁSISHT'HA, and more particularly those by the other holy writers, in pursuyncе of the works of eminent authors, may be correctly regarded, as referring exclusively to the son given†; the adoption of a *Kritrima* son, being held to be valid, without the observance of any particular form or solemnities.‡

Should a son be adopted, without the observance of prescribed form, his filial relation would not be established, but he would be entitled to assets sufficient to defray the expence of his marriage.

D. M. Sect. V. Para 45. & 46. D. Ch. Sect. II. Para 17. D. Ch. Sect. VI. Para 3.

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* v. Note XIII. † v. Note XIV. ‡ v. Notes XV. & XVI.

D. M. Sect. IV. Para 22. et seq. D. Ch Sect. II. Para 22. et seq.

The *Dattaka* adopted son, except perhaps in the case of a nephew, affiliated by an uncle, must be initiated in certain rites, in the name and family of his adoptive father, and the *Kritrima* son, in some instances may, but in all, need not necessarily be so intiated.* The question as to the particular rites, required, has already been discussed under the preceding head.

HEAD FOURTH.

The Effects of Adoption.

D. M. Sect. VI. D. Ch. Sect. V.

The legally adopted *Dattaka*, or son given, in all cases is, and the *Kritrima*, or son made, in some instances may be, invested with every filial right, in respect to his adoptive father, of whose family he becomes a member.†

D. M. Sect. VI. Para 6. 7. D. Ch. Sect. II. Para 18. 19.

The *Dattaka* adopted son ceases, to have any claim to the family or estate, and his incapable of performing the funeral rites, of his natural father, except, where affiliated as a *Dwyámushyáyana* or son of two fathers. This rule would not apply to the *Kritrima* adopted son, who would be necessarily the son of two fathers‡, unless (if such case could occur,) where, wholly uninitiated in the family of his natural family.

D. M. Sect. VI. Para 10 & 47.

The adopted son cannot marry, any kinswoman related to his father and mother, within the prohibited number of degrees, as his consanguineal relation endures; nor the son of two fathers marrying in the general family of either.

D. Ch. Sect. IV. Para 2. et seq.

The adopted son not only inherits of his adoptive father, but likewise lineally and collaterally‖, of the near and distant kinsmen of that person. He likewise represents the real legitimate son, in relationship to his adoptive mother, whose ancestry are his maternal grandsires. The rule however, now suggested, would not apply to the *Kritrima* son, as usually adopted in the *Mait' hila* country§.

D. M. Sect. VI. Para 50. 51. 52.

* v. Note XVII.
† v. Note XVIII. ‡ v Note XIX. ‖ v. Note XX. § v. Note XXI.

HEAD FIFTH.

Special Rules.

Firstly.—Regarding the Dwyámushyáyana.

THE adopted son may retain filial relation to his natural father, in which case, he is called a *Dwyámushyáyana*, or son of two fathers. This double filial relation proceeds from a special agreement, between the adoptive and natural father, at the time of adoption, or may exist without such agreement, as mostly, if not always, in the case of the *Kritrima* adopted son, who is not alienated by his natural father. In the first case, such son is denominated a complete *(nitya)*, in the second, an incomplete *(anitya)*, *Dwyámushyáyana*.

D. M. Sect. VII. Para 41. et seq. D. Ch. Sect. II. Para 36 et seq.

The adopted son, who is son of two fathers inherits the estate and performs the obsequies of both fathers, but, the relation of the issue (except in the case of the *Krttrima* son, as usually affiliated in the *Mait' hila* country); obtains exclusively to the family of the adoptive father.

D. M. Sect. VI,

Secondly.—Regarding the succession of the adopted Son.

Thirdly.—Regarding the succession of co-existent Legitimate and Adopted Sons.

WHERE, subsequent to an adoption legally made, a legitimate son is born to the adopter, the adopted son, at a division of heritage with such son, receives a quarter-share* according to the *Dattaka Chandrika*. A distinction however obtains in the case of the *Dwyámushyáyana*.—From an obscure part of that work, it would appear, to be the doctrine of its author, that such son, would only take half the share, to which the son absolutely adopted, would be entitled, in particpating with a legitimate son, subsequently born.—On the same principles, this author appears to provide that, where legitimate issue is subsepuently born to the natural father, the *Dwyámushyápana* only takes in the state of such father, the half of the share of a legitimate son.

D. M. Sect. V. Para 40. D. M. Sect. X. Para 1. D. Ch. Sect. V. Para 17.

* v. Note XXII. subjoined

KRITRIMA FORM OF ADOPTION.

(A critical Essay on the Hindu Law of Adoption by A Hindoostani Hindoo Vakeel, pp. 174—177.)

Of the twelve descriptions of sons, *viz.*, "the son begotten by a man himself in lawful wedlock, the son of his wife begotten in the manner before mentioned, a son given to him, a son made or adopted, a son of concealed birth, of whose real father cannot be known, and a son rejected by his natural parents are the six kinsmen and heirs."—(Menu, Chap. IX, sloka 159.)

"The son of a young woman unmarried, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son by *Sudra*, are the six kinsmen, but not heirs to collaterals."—(Menu, Chap. IX, sloka 160.)

ঔরসঃ ক্ষেত্রজশ্চৈব দত্তঃ কৃত্রিম এবচ
গূঢ়োপন্নোঽপবিদ্ধশ্চ দায়াদাবান্ধবাশ্চ ষট্।

(Menu Sanghita, Chap. IX, sloka 159, p. 568.)

কানীনশ্চ সহোঢ়শ্চ ক্রীতঃ পৌনর্ভবস্তথা
স্বয়ন্দত্তশ্চ শৈদ্রশ্চ ষড় দায়াদ বান্ধবাঃ।

(Menu Sanghita, Chap. IX, sloka 160, p. 569.)

The author of the Dattaka Chandrika, on the authority of a passage attributed to Aditya Purana, holds that, at the present *Kali* age, among the substituted sons the *dattaka* son is only valid—(*vide* Sec. I, v. 9, Dattaka Chandrika). The author of the Dattaka Mimansa, on the other hand, on the authority of Parasara, holds that *kritrima* son is also valid.

"দত্তপদং কৃত্রিমস্যাপ্যুপলক্ষণম্ ঔরসঃ
ক্ষেত্রজশ্চৈব দত্তঃকৃত্রিমকঃ সুত" ইতি কলি ধর্ম্ম প্রস্তাবে পরাশর স্মরনাৎ।

"The term given is inclusive also of the sons made, on account of a text of Parasara on the occasion treating on the law of the *Kali* age."—(Dattaka Mimansa, Sec. I, v. 65

Now, I ask our Hindoo lawyers, whether the author of the Dattaka Chandrika was right in allowing Parasara to be overruled by a passage of Aditya Purana? Are not Puranas always inferior to Smritis? Even texts of sages other than Menu ought not to have overruled Parasara, for it is stated in Parasara Sanghita: The *Dharms* enjoined by Menu are assigned to the *Satya Yoog*; those by Gotama, to the *Trita*; those by Sancha and Lichita, to the *Dwapara*; and those by Parasara to the *Kali Yoog*.

"কৃতেতু মানবা ধর্ম্মা ত্রেতায়াং গৌতমাঃ স্মৃতাঃ
দ্বাপরে শাঙ্খ লিখিতাঃ কলৌ পরাশরাঃ স্মৃতাঃ"

So it will be seen that, even admitting Menu's superiority over all sages, *kritrima* son ought to have been declared valid, as Parasara ordained, for he is not inconsistent with Menu; and besides that, he is the lawgiver of the *Kali Yoog*; and our present legislature, represented by the late Lord Dalhousie's Council, indirectly admitted that fact by passing the Hindoo Widow Remarriage Act. Of all the inhabitants of India, Bengalees, who raised such a clamour for the superiority of Parasara in the *Kali* age, would, I think, be ashamed of disallowing Parasara, by the authority of Aditya Purana, or any other authority than that of Menu. We learn from Sutherland and other English writers that *kritrima* form of adoption is only prevalent in Mithila, and has become extinct in other countries.

If the kind of sons we so often meet among the lower castes in Bengal, called *palakputtra*, who are in every way treated as adopted sons and about whom we find no litigation, because they have no patrimony worth fighting for to inherit, do not come within the category of *Kritrima* son, I must then join with the English writers to say that the *Kritrima* form of adoption is only prevalent in Mithila. This system of adoption does not certainly now obtain among the zemin-

dars of Bengal. I now proceed to consider what are the rights of a *kritrimá* son in the provinces of Mithila, and how a *kritrima* adoption may be effected. No ceremonies are necessary to constitute a *kritrima* adoption, the agreement of the parties being alone sufficient—*Kalyan Singh* v. *Kripa Singh* (Sel. Rep., Vol. I, new edition, p. 11).

The prohibition with regard to the adoption of a sister's son does not apply to the case of *kritrima* form of adoption; and it effects no change either of paternity or of maternity; there is merely an arrangement between the adoptier and the adopted, with the addition of certain legal rights of inheritance and legal duties—*vide Chowdhury Parmeshar Dutt* v. *Hanooman Datta Ray* (Sel. Rep., Vol. Vi, p. 235, new ed).

A *kritrima* son, in some instances, may be invested with every filial right. The *kritrima* son, as usually affiliated in Mithila country, would, indeed, take the estate of his adoptive father. (See note 18, Sutherland's Dattaka Mimansa and Dattaka Chandrika.) But a son affiliated in *kritrima* form by a widow, is not regarded as related in any way to her husband, and merely succeeds to her exclusive property; (See note 5, and see also notes 15 to 21, Dattaka Mimansa and Dattaka Chandrika.) I do not find any reason for holding that the *kritrima* adopted son would succeed to his adoptive mother's property, and not to his father's, or to that of the adoptive father and not to the mother's, or, in other words, that he should only succeed to the property of the adopter.

In the case of *The Collector of Tirhoot on behalf of the Court of Wards* v. *Hari Prasad Mahanta* (W. R., Vol. VII, p. 500), it was held, that a Hindoo widow in Mithila has power to adopt a son in *kritrima* form without her husband's consent; but such a son would not succeed to the property left by the husband of his adoptive mother, but would be considered her son, and entitled to succeed her only. It was

further held that such a son does not lose his position in his own family. I do not see any reason for making this distinction unless one would attempt, like the pandits of old, to overcome clear passages of Hindu law, too stubborn for other manipulation, by the often baseless allegation of custom. If *kritrima* system of adoption is allowed to prevail, let the *kritrima* son take the property as Menu ordains—

"ঔরস ক্ষেত্রজৌ পুত্রৌ পিতৃরিক্থস্য ভাগিনৌ।
দশা পরেষু ক্রমশো গোত্ররিক্থাংশভাগিনঃ।"
(১৫৯ শ্লোক ৯ অধ্যায় মনুসংহিতা।)

The son of the body and the son of the wife will divide the property between themselves, left by their father. As for "the other ten sons, let them take the property as enumerated "ed those last named being excluded by any one of the "preceding." According to sloka 159, Chap. IX. *kritrima* son stands fourth in the list; so, in the absence of an adopted son, he (the *kritrima*) ought to be entitled to all the legal rights given to an adopted son. He ought to be allowed to take not only the property of his adoptive mother's husband, but being within the first six of Menu's enumerations, like an adopted son, he ought to take the property of his adoptive father's relatives both *sogotra* and *asogotra*. (*Vide* Cal. Law Rep., Vol. IV, p. 538.)

MINORITY AND GUARDIANSHIP.

(Mayne pp. 187—192.)

Period of minority.

§ 188. MINORITY under Hindu law terminates at the age of sixteen. There was, however, a difference of opinion as to whether this age was attained at the beginning, or at the end, of the sixteenth year. The Hindu writers seem to take the former view (*a*), and this was always held to be the law in Bengal (*b*). The latter limit is stated to be the rule in Mithila and Benares, and was followed in Southern India and apparently in Bombay (*c*). Different periods were also fixed for special purposes by statutes, which it does not come within the scope of this work to discuss. These variances will soon lose all importance in consequence of Act IX. of 1875, which lays down as a general rule for all persons domiciled in British India or the Allied States, that where a guardian has been appointed by a Court of Justice, or where the Court of Wards has assumed jurisdiction, minority terminates at the completion of the twenty-first year; in all other cases, at the completion of the eighteenth year. (*d*). But the Act is not to affect any person in respect of marriage, dower, divorce, or adoption.

§ 189. GUARDIANSHIP.—The Hindu law vests the guardianship of the minor in the sovereign *parens patriæ*. Of course this duty is delegated to the child's relations. Of

Order of guardianship.

these the father, and next to him the mother, is his natural guardian. In default of her, or if she is unfit to exercise the trust, his nearest male kinsmen should be appointed, the

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(*a*) 1 Dig. 293; 2 Dig. 115; Mitakshara on Loans, cited V. Darp., 770; Daya Bhaga. iii. 2, § 17. note; Dattaka Mimansa, iv. § 47.

(*b*) 1. W. Mac N. 103; 2 W. Mac N. 220, 288, note *Callychurn* v. *Bhuggobutty* 10 B. L. R. 231; S. C. 19 Suth. 110; *Mothoor Mohun* v. *Surendro*, I Cal. 108.

(*c*) W. MacN. *ubi sup*; 1 Stra H. L. 72; 2 Stra. H. L. 76 77; *Lachman* v. *Rupchand*, 5 S. D. 114 (136); *Shivji* v. *Datu*, 12 Bom. H. C. 281, 290.

(*d*) *Khwahish* v. *Surju*, 3. All. 598.

paternal kindred having the preference over the maternal (*e*). Of course, in an undivided family, governed by Mitakshara law, the management of the whole property, including the minor's share, would necessarily be vested in the nearest male, and not in the mother. It would be otherwise where the family was divided (*f*). But this would not interfere with her right to the custody of the child itself (*g*). A mother loses her right by a second marriage (*h*), and a father loses his right by giving his son in adoption (*i*). And, of course, any guardian, however appointed, may be removed for proper cause (*k*). Little or nothing is to be found on the subject of guardianship in works on Hindu law. The matter is principally regulated by statute (*l*).

Right of guardian to custody of minor.

§ 190. The right of the guardian to the possession of the infant is an absolute right, of which he cannot be deprived, even by the desire of the minor himself, except upon sufficient grounds. In the case of parents, especially, it is obvious that the custody of their child is a matter of greater moment to them than the custody of any article of property. Cases

(*e*) Menu, viii. § 27; ix. § 146, 190, 191; 3 Dig. 542—544; F. Mac N. 25; 1 Stra. H. L. 71; 2 Stra. H. L. 72—75; *Gungama* v. *Chendrappa* Mad. Dec. of 1859, 100; 1 W. Mac N. 103; *Mooddookrishna* v. *Tandavroy*, Mad. Dec. of 1852. 105; *Mithiboo* v. *Gunesh*, S. D. of 1854, 329. Under Mithila law, however, it has been held that the mother is entitled to be guardian of the person of her minor son in preference to the father. Jussoda v. Lalla Nettya, 5 Cal. 43. As to the claim of the step-mother, see Lukinee v. Umurchund; 2 Bor. 144 [163]; Ram Bunsee v. Soobh Koonwaree, 7 south. 321; S. C. 3 Wym. 219; S. C. 2 in. Jur. 193, Baee Sheo v. Ruttonjee, Morris, Pt. I. 103.

(*f*) Alimelammal v. Arunachellam, 3 Mad. H. C. 69; Bissonauth v. Doorgaprsad, 2 M. Dig. 49; Gourahkoori v. Gujadhur, 5 Cal. 219. But she can sue on his behalf if the proper guardian refuses to do so; Mokrund Deb. v. Ruttee Bissessuree, S. D. of 1853, 159.

(*g*) Kooldeep v. Rajbunsee, S. D. of 1847, 557.

(*h*) Baee Sheo v. Ruttonjee, Morris, Pt. 103.

(*i*) Lakshmibai v. Shridar, 3 Bom. 1.

(*k*) Alimelammal v. Arunachellam 3 Mad. H. C. 69; Gourmonee v. Bamasoondaree, S. D. of 1860, i. 532; Skinner v. Orde, 14 M. I. A., 309; S. C. 10, B. L. R. 125; S. C. 17 Suth 77; Kanahi v. Biddya, 1 All. 549; Abasi v. Dunne, 1 All. 598.

(*l*) See Ct. of Wards Acts. Beng. Reg. XXVI of 1793, LII of 1803, VI of 1822; Mad. Reg. V of 1804 Act, XX of 1864; Bengal Act. IV of 1870. Minors not under Court of Wards, Acts XL of 1858, IV of 1872, Education and marriage of minors, Acts XXVI of 1854, XXI of 1855, XIV of 1858. Ram Bunsee

however, have frequently occurred in the Indian Courts, where the right of a parent to recover his child has been contested, on the ground that the parent had changed his religion, and was therefore no longer a fit guardian for his child; or that the child had changed its religion, and was no longer willing to live with its parent. On the former point it has been decided, that the fact that a father has changed his religion, whether the change be one to Christianity or from Christianity, is of itself no reason for depriving him of the custody of his children. It would be different, of course, if the change were attended with circumstances of immorality, which showed that his home was no longer fit for the residence of the child (*m*). But the case of a change of religion by the mother might be different. The religion of the father settles the law which governs himself, his family, and his property. "From the every necessity of the case, a child in India, under ordinary circumstances, must be presumed to have his father's religion, and his corresponding civil and social *status*; and it is, therefore, ordinarily, and in the absence of controlling circumstances, the duty of a guardian to train his infant ward in such religion." Therefore, where a change of religion on the part of the mother would have the effect of changing the religion, and therefore the legal *status* of the infant, the Court would remove her from her position as guardian. And the asserted wish of the minor, also, to change his religion, in conformity with that of the mother, would not necessarily alter the case; unless, perhaps, where the advanced age of the minor, and the settled character of his religious convictions would render it improper, or impossible, to attempt to restore him to his former position (*n*).

Change of religion by parent.

v. Soobh Koonwaree, 7 Suth. 321; S. C. 3 Wym. 219; S. C. 2 In. Jur. 193; Ramchunder v. Brojonath, 4 Cal. 929. See as to Procedure, Act IX of 1861; Guardian and Ward Act, XIII of 1874.

(*m*) R. Bezonji, Perry O. C. 91.

(*n*) Skinner v. Orde, 14 M. I. A. 309; S. C. 10 B. L. R. 125; S. C. 17

§ 191. The case of a child voluntarily leaving its parents has frequently occurred where there has been a conversion to Christianity. It seems at one time to have been the practice of the Courts of Calcutta and Madras to allow the child to exercie his discretion, if upon a personal examination they were satisfied that his wish was to remain away from his parents, and that he was capable of exercising an intelligent judgment upon the point. The contrary rule was for the first time laid down by the Supreme Court of Bombay, when they directed a boy of twelve years old to be given back to his father, and refused to examine him as to his capacity and knowledge of the Christian religion, or as to his wish to remain with his Christian instructors (*o*). This course was approved by Mr. Justice *Patteson*, to whom Sir Erskine Perry referred the point (*p*). That decision was followed in the Supreme Court of Madras in 1858, in the case of *Culloor Narrainsawmy* (*q*), when Sir *Christopher Rawlinson* and Sir *Adam Bittleston* decided that a Hindu youth of the age of fourteen, who had gone to the Scottish missionaries, should be given up to his father, though he had become a convert to Christianity, and was most anxious to remain with his new protectors. A similar decision was given in Calcutta in 1863, by Sir *Mordaunt Wells*, where a boy of fifteen years and two months had voluntarily gone to reside with the missionaries (*r*). It may also be observed, that it is a criminal offence under the Indian Penal Code, to entice from the keeping of its lawful guardian a male minor under the age of fourteen, or a female minor under the age of sixteen (*s*).

by infant.

(*o*) R *v.* Nesbitt, Perry, O. C. 103.

(*p*) Ib. p. 109.

(*q*) Not Reported. I was counsel for the missionaries in the case.—J. D. M.

(*r*) Re Hemnauth Bose, 1 Hyde, 111.

(*s*) I. P. O. ss. 161, 363. The consent, or wish, of the minor is quite immaterial. See cases cited sub loco. Mayne's Commentaries on the Indian Penal Code.

Illegitimate.

§ 192. The mother is the natural guardian of an illegitimate child. But where she has allowed the child to be separated from her and brought up by the father, or by persons appointed by him, the Court will not allow her to enforce her rights. Especially if the result would be disadvantageous to the child, by depriving it of the advantages of a higher mode of life and education (*t*).

Effect of contract.

§ 193. Contracts made by a minor himself are at the utmost voidable, not void. If made for any necessary purpose they are absolutely binding upon him, and they can always be ratified by him after he attains full age, either expressly, or impliedly by acquiescence, and taking the benefit of them (*u*). He will also be bound by the act of his guardian, when *boná fide* and for his interest, and when it is such as the infant might reasonably and prudently have done for himself, if he had been of full age (*v*). But not where the act appears not to have been for his benefit (*w*), unless he has ratified it on reaching his majority (*x*). And

(*t*) R. *v.* Fletcher, Perry. O. C. 109; Mittibhayi *v.* Kottekarati, Mad Dec. of 1860, 154; Lal Das v. Nekunjo, 4 Cal. 374.

(*u*) Rennie *v.* Gunganarin, 8 Suth. 10; Boiddonath *v.* Ramkishore, 13 Suth. 166; Doorga Churn *v.* Ram Narain ib. 172.

(*v*) Cauminany *v.* Pernmma, Mad. Dec. of 1855, 99; Temmakal *v.* Subbammal, 2 Mad. H. C. 47; Kumurooddeen *v.* Shaikh Bhadoo, 11 Suth. 134; Makbul *v.* Srimati Masmad. 3 B. L. R. (A. C. J.) 54; S. C. 11 Suth. 395; Gooroopersad *v.* Muddun. S. D. of 1856, 980; Soonder Narain *v.* Bennud Ram, 4 Cal. 76. Roshan Singh *v.* Har Kishan, 3 All. 535. Sikher Chund *v.* Dulputty, 5 Cal. 363. See as to a guardian's power of leasing, Nobokissen *v.* Kaleepersad, S. D. of 1859, 607; Gopeenath *v.* Ramjewun, ib 913; Bebee Sowlutoonisa *v.* Robt. Savi ib. 1575. See as to contracts requiring statutory sanction, Debi Dutt *v.* Subodra, 2 Cal. 283. Manji Ram *v.* Tara Singh 3 All. 852. Doorga Persad *v.* Kesho Persad, 9 I. A. 27.

(*w*) Sambasivien *v.* Kristnien, Mad. Dec. of 1858. 252; Naweb Syud Ashrufooddeen *v.* Mt. Shama Soonderee, *v.* D. of 1853. 531; Nubokisken *v.* Kaleepersad, S. D. of 1859, 607; Lalla Bunseedhur *v.* Koonwur Bindeseree, 10 M. I. A. 454. A guardian may pay debts barred by statute if fairly due, Chowdhry Chuttersal *v.* Government, 3 Suth. 57.

(*x*) Chetty Calum Rajah Rungasawmy 8 M. I. A 319; S. C. 4 Suth. (P. C.) 71. Golaub Koonwurree *v.* Eshan Chunder, 8. M. I. A. 447; S. C. 2 Suth. (P. C.) 47. Kumurooddeen *v.* Shaika Bhadoo 11 Suth. 134; Thobanny *v.* Teerpurachurn, 2 M. Dig. 100; Mongooney *v.* Gooroopersad, ib 188. A ratification will be of no effect, if the property has already passed away from the person who ratifies the transaction, Lallah Rawuth *v.* Chadee, S. D. of 1853. 312.

where the act is done by a person who is not his guardian, but who is the manager of the estate in which he has an interest, he will equally be bound, if under the circumstances the step taken was necessary, proper, or prudent (*y*).

Where, however, the act is done by a person in possession of property, who does not profess to be acting on behalf of the minor, but who claims to be independant owner, and to be acting on his own behalf, it will not bind the infant who is really entitled (*z*).

Equities on setting aside.

Of course the objection to an act on the ground of minority must be taken by the minor himself. Those who deal with him are always bound, though he may not be (*a*).

Where a minor on coming of age sues to set a sale aside, he is bound to refund the purchase money, when his estate has benefited by it, or to hold the property charged with the amount of debt from which it has been freed by the sale (*b*).

Decrees.

§ 194. A minor, who is properly represented in a suit, will be bound by its result, whether that result is arrived at by hostile decree, or by compromise (*c*). But the Court will not make a decree by consent without ascertaining whether it is for the benefit of the infant (*d*). And the mere fact that a proceeding was partly conducted through the inter-

(*y*) Hunoomanpersad v Mt. Baboobee 6 M. I. A. 393.

(*z*) Bahur Ali v. Sookeea, 13 Suth. 63.

(*a*) Canaka v. Cottavappah, Mad. Dec. of 1855, 184.

(*b*) Bukshun v. Doolhtn 12 Suth. 337; S. C 3 B. L. R. (A. C. J.) 423; Paran Chandra v. Karunamayi, 7. B. L. R. 90; S. C. 15 Suth. 268; Bai Kesar v. Bai Gauga, 8 Bom. H. C. (A. C. J.) 81; Mirza Pana v. Saiad Sadik 7 N. W. P. 201; Kuvarji v. Moti Haridas, 3 Bom. 234; and see Gadgeppa v. Apaji, 3. Bom, 237.

(*c*) Venkateswaraswami v. Krishnasomayajulu, Mad. Dec. of 1860, 243; Tarinee Churn v. Watson, 12 Suth. 414; S. C. 3 B. L. R. (A. C. J.) 437; Modhoo Soodun v. Prithee Bullub, 16 Suth. 231; Jungee Lall v. Shom Lall, 20 Suth. 120; Lekraj v. Mahtab, 14 M. I. A. 393; S. C. 10 B. L. L. R. 35; S. C. 17 Suth 117; Mrinamoyi v. Jogo Dishuri 5. Cal. 450. and the guardian may equally compromise olaims before suit, Gopeenath v. Ramjeewun, S. D. of 1859. 913.

(*d*) Ram Churn v. Mungul, 16 Suth. 232, Civil Procedure Code, Act XIV of 1882. S. 492; Rajagopal v. Muttupalem, 3 Mad. 103.

vention of a Civil Court—as, for instance, a decree on a foreclosure—does not give it any additional validity against a minor, unless he is properly made a party to the proceeding at a stage when he can question it on its merits (e). Of course a compromise or a decree can always be set aside if obtained by fraud (f).

Suits against guardian.

A guardian is liable to be sued by his ward for damages arising from his fraudulent or illegal acts (g). For debts due by the ward, the guardian of course is only liable to the extent of the funds which have reached his hands (h).

(e) Buzrung v. Mt. Mautora, 22 Suth. 119.
(f) Lekraj v. Mathab 14 M. I. A. 393; S. C. 10 B. L. 65; S. C. 17 Suth. 117; Bibee Solomon v. Abdul Azeez, 6 Cal. 687.
(g) Issur Chunder v. Ragab, S. D. of 1860, 1. 349.
(h) Sheikh Azeemoodeen v. Moonshee Auther, 3 Suth. 137.

WIDOW'S RIGHTS AND POWERS.

(Synopsis of the Tagore Law Lectures by T. N. Mitter, Esqr., M. A., D. L.)

Almost all the authorities current in the different schools are agreed in recognising the title of five female relatives to succeed to the property of a Hindu dying without male issue and intestate. These are

1. The widow.
2. The daughter.
3. The mother.
4. The grand-mother.
5. The great grand-mother.

By none of the schools is the *sister* recognised as an heir, except the *Maharashtra* school.*

Of the five female relatives mentioned above, the widow succeeds first.

According to the rule † of the Mitacshara followed by the other schools, except Bengal, the widow takes the whole estate of a man who being separated from his co-heirs, and not subsequently re-united with them, dies leaving no male issue; in the case of undivided property, the widow does not succeed, ‡she is only entitled to maintenance. According to the Bengal school, the widow succeeds to the estate of her husband whether he was united or separated.§

The widow, however, who succeeds to the estate of her husband is, according to all authorities, the *chaste* widow; or, in other words, the widow who, during her husband's life-time, was not guilty of unchastity.‖ A wife who commits adultery

* Bhaskar Trimback Acharya v. Mahadev Ramji and others,—6 Bom. H. C. R., 1; Venayeck Anund Row v. Luxumee Bai and others,—9 Moore's I. A., 516.

See Vyavahara, Mayukha, Chap. IV, Sec. VIII., para. 19.

† See Mitacshara, Chap. II., Sec. I., paras., 30 & 39; Vyavahara Mayukha, Chap. IV., Sec. VIII., para. 7.—*Ed.*

‡ Runjeet Singh v. Obhoy Narain Singh, 2 Sel. Rep., p. 315. (See also Vyavahara Mayukha, Chap. IV., Sec. VIII., para 6—*Ed.*)

§ See Dayabhaga, Chap. XI., Sec. I., para. 3; Daya-crama Sangraha, Chap. I., Sec. II, para. 1.—*Ed.*

‖ Kerry Kolitanee v. Moniram Kolita, 19 W. R., 367 *et seq.*

during the life-time of her husband loses* her right to inherit her husband's estate, unless the act is condoned by her husband or expiated by penance.

If a man dies leaving more widows than one, all his widows succeed to his estate together; the estate to which they succeed is one estate in law, with the right of survivorship attached to it, so that on the death of one widow, her interest survives to the surviving widows, and does not descend to the other heirs of her husband. So long, therefore, as a single widow is alive, no portion of the husband's estate can descend to the other heirs of her husband.†

If two widows effect, among themselves, a partition of their husband's estate, by such partition the right of survivorship is not destroyed. The right of survivorship is so strong that the survivor takes the whole property to the exclusion of the daughters of the deceased widow.‡

The widow succeeds to such property of her husband, as he was possessed at the time of his death, or was entitled to at that time. The widow does not, for the purposes of inheritance, *represent* the husband; *(i. e.,)* the widow will not be entitled to any property to which her husband, if living, would have been entitled by right of inheritance.§

If the husband, however, had been entitled to property of which he did not or could not take possession during his life-time, then, on his death, his widow, as his heiress, would be entitled to sue, if the law of limitation did not bar her, to recover possession of the said property, the cause of action in such a case descending to the widow, The widow would also be entitled to succeed to possession of the property in which

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* Matunginee Debea v. Joy Kali Debea. 14 W. R., 23, A. O. J.
† Bhugbuty Raur v. Radhakissen Mookerjea, Montriou's Cases, 314.
‡ 11 Moore's I. A., 487, Bhugwandeen Debey v. Mynn Baee.
§ Hurosunderee Debee v. Rajessuree Debee, 2 W. R., 321.

her husband had a vested interest under a will or deed, the actual enjoyment of the same by her husband having been postponed by an intervening life-estate.*

There is a class of persons whom the Hindu law has declared incapable of inheriting. They are as follows:—"Impotent persons, outcasts, persons born blind and deaf, madmen, idiots, dumb person, and those who have lost a sense or a limb."† Lepers and religious mendicants are also included‡ in this category. These persons are excluded from the inheritance. Their widows, therefore, take nothing, since they themselves took nothing; although their sons, who are free from those defects, would inherit property which they, but for those defects, would have themselves inherited. The widows of such persons however are entitled to maintenance to the end of their lives§ and Yajnawalkya adds, on condition of their conducting themselves aright.‖ But if they are unchaste, they should be expelled.

The Hindu law, however, only declares that those persons (impotent, &c.) are incapable of *inheriting* property; there is no authority which declares that they are incapable of *holding* property (like persons attainted in English law). Therefore, a person falling within this category is perfectly competent to acquire property by purchase or gift or the like; and their widows would succeed to any such property which they might have held during their life-time.

All the schools agree, as a rule, in regarding the widow's estate as a representative estate, as typical of the estates which the other female heirs have in the property of their male relatives.

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* Hurosunderee Debee v. Rajessuree Debee, 2 W. R., 321; Rowan. Persad v. Mussamut Radha Bebee, 4 Moore's I. A., 137.

† Menu, Chap. IX., V. 201.

‡ Devala.

§ Dayabhaga, Chap. V., para. 19.

‖ Mitacshara, Chap. II., Sec. I., para. 21.

OBLIGATIONS OF WIDOWS.

How far the Hindu widow is obliged in these days to observe the strict mode of life enjoined upon her, was the subject of discussion before the Bengal High Court.§ The suit was one for maintenance brought by the step-mother against her step-son; and the defendant pleaded, in diminution of the plaintiff's claim, that by the *Shaster's* she is bound to lead a very strict and austere life, and, consequently the amount claimed was excessive. On this the Court observed as follows:—"As to the life of semi-starvation and wretchedness, in which it is argued that, according to the *Shasters*, a Hindu widow ought to live, that is a matter of religious or ceremonial observance rather than of law. A Hindu widow is in these days at all events entitled to decent food and clothing if the head of the family is in a position to supply them."

OBLIGATION OF WIDOW AS AN HEIRESS.

The leading case of Kerry Kolitance* *v.* Moniram Kolita, established the following points:—

1. The widow is not a *trustee* in the sense which is ordinarily attributed to that word.

2. That as other female heirs, such as the daughter, &c., do not forfeit their estate if they fail to perform duties for which the estate was conferred upon them, there is no reason for declaring, in the case of the widow, that she forfeits her estate for such incapacity. A daughter, who had succeeded as a spinster, would continue to hold the estate even after the death of her childless husband, when she becomes wholly inefficacious to confer benefits for which she was selected.

3. The widow's estate is not conditional upon her using it for the purpose of benefiting her husband.

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* Hurry Mohun Roy *v.* S. M. Nayantara, 25 W. R., 474.
† 10 W. R., 367.

4. The proposition that, if a trustee is not in a position to fulfil his duties, the trust property must be taken away from him, is not correct either in Hindu or in English Law.

5. The text of Katyana, "let the childless widow preserving unsullied the bed of her lord, &c.," is not to be interpreted as making the enjoyment conditional upon her keeping unsullied the bed of her lord.

6 The proposition that an estate once vested cannot afterwards be divested, is unsupported by authorities in Hindu Law.

7. There is no analogy between the widow's estate and the widow's maintenance.

8. That the estate once inherited by the widow is not forfeited simply by unchastity.

The result, on an examination of the authorities* regarding the widow's obligation to reside with the members of her husband's family, may be summed up as follows:—

1. The widow is not obliged to reside with her husband's family.

2. That she has a perfect freedom of choice in the matter of her residence, provided the residence be not improper or be not for unchaste porposes.

3. By the voluntary change of residence, or by refusal without any cause to reside with her husband's family, she does not forfeit her right to the property of her husband.

4. Nor does she forfeit her right to maintenance from the heirs of her husband, to whom her husband's property has passed on his death.

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* Kasinath Bysack *v.* Hurosunderee Dossee, Montriou's Cases of Hindu Law, p. 495; Oma Debia *v.* Kishen Moni Debia, 5 Sel. Rep., p. 323; Raja Prithee Singh *v.* Rance Raj Kower. 20 W. R., 21; Jadu Moni Dasi *v.* Khetra Mohun Sil' Shama Churn Sircar's Vyavstha Darpana, p. 384; Surnomoyee Dossee *v.* Gopal Lal Dass, 1 Marshall, 497.

NATURE AND EXTENT OF WIDOW'S ESTATE.

The following propositions* may be considered as established:—

1. The widow must enjoy the estate during her life.

2. The enjoyment must be by a moderate use of it.

3. The use should not be by wearing delicate apparel and similar luxuries.

4. She is not entitled to make a gift, mortgage, or sale of it.

5. But a gift or other alienation is permitted for the completion of her husband's funeral rites.

6. If the widow is unable to subsist otherwise, she is authorised to mortgage, sell, or otherwise alienate it.

7. The widow is permitted to make presents to the *sapindas* and other relatives of her husband at his funeral rites.

8. With the consent of her husband's relatives, she may bestow gifts on the kindred of her own father and mother.

9. The widow is enjoined to give to an unmarried daughter a fourth part out of her husband's estate to defray the marriage expenses of the girl.

10. On the death of the widow the property goes to the heirs of her husband, and not to the heirs of her *stridhan*.

11. The property inherited by the widow does not become her *stridhan*.

The substance of the reported cases on the subject of the widow's estate may be stated to be as follow:—

1. That the widow completely represents the estate.†

2. That generally whatever bars the widow would also bar the reversioners.*

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* See Dayabhaga, Chap. XI, Sec. I., paras. 56 to 66.

† Goluck money Debee v. Digumbur Dey, 2 Boulnois' Rep., 193; Katama Natchiar v. The Raja of Sivagunga, 9 Moore's I. A., 539; Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty, 9 W. R., 505.

3. That by her alienations she conveys an absolute interest under certain circumstances.

4. That the circumstances under which she conveys an absolute interest, it is very difficult generally to define.†

5. She is not a mere life-tenant.‡

6. The extent of her interest over moveable and immoveable property is, in Bengal, the same.§

A reversionary heir, who is bound by a decision against the widow respecting the subject matter of inheritance, is also barred by limitation, if without fraud or collusion the widow is barred by limitation.

The reversioner has the right of bringing a suit against the widow and the adverse holder for the purpose of having the estate reduced into proper possession. In such a case, the possession of the property so recovered shall not be given to the reversioner, but a manager should be appointed by the Court to take charge of the property and to account, to the Court, of all the rents and profits, and the Court shall hold the same for the benefit of the heirs who may happen to succeed on the death of the widow.‖

It is not strictly correct to say that the widow is a trustee and her estate a trust estate.* By the Hindu law, the widow holds the estate for her own benefit. She is entitled to enjoy the usufruct of the property during her life, and the alienations of the property by her, in some cases stand good and pass an absolute interest to the alience.

A Hindu widow has no power to alienate the profits of the estate which she had inherited from her husband, and

† Jodoomonee Debee v. Saroda Prosunno Mukerjea, 1 Boulnois, 129.

‡ Kasinath Bysack and another v. Hurrosundry Dossy, Montrion's Cases, p. 495.

§ Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty, 9 W. R., 508; Amrito Lall Bose v. Rojoni Kant Mitter, 23 W. R., 214, and Mussamut Bhogbuti Day v. Chowdry Bhola Nath Takobr and others, 24 W. R., 168.

‖ Radhamohun Dhur v. Ramdoss Dey, 3 B. L. R., 363; Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty, 9 W. R., 505.

* 19 W. R. 409; 20 W. R. 187.

any property which she may purchase from such profits would become an increment to the estate which she had inherited, and would follow that estate in its devolution.*

The result of the decisions regarding the widow's power over the estate inherited by her from her husband may be thus summed up;—

1. The widow has full power to spend the current income in any manner she thinks proper.†

2. If property is purchased from those profits, it is doubtful whether she has the absolute power to alienate it.‡

3. If she leaves property so purchased undisposed of at her death, it will form part of her husband's estate and follow the same in its devolution.§

How far a widow can claim partition by metes and bounds from the co-parceners of her husband may sometimes be a question. The point seems to have been expressly raised in a recent case‖, in which the Court ruled that it was discretionary with the Court to order a partition at suit of the widow. If the widow was childless and her share small, probably the Court will not order a partition, as the defendants themselves in such cases are usually the reversioners of the widow. But where the widow's share is large, and she has children, in such cases partition will be ordered.

In an undivided family according to the Mitacshara, the self-acquired property of one co-sharer will, on his death,

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* 24 W. R, 168, Mussamut Bhugbuty Daee v. Chowdry Bholanath—(Privy Council case.)

† Chundrabulee Debia v. Brody, 9 W. R, 584; Grose v. Omirtomoyee Dossee, 12 W. R., p. 13, A. O. J., In the goods of Hurrender Narain Ghose, Kashee Nath Ghose, v. Bissonath Biswas, *vide Englishman*, dated the 2nd July 1853; Sreemutty Puddomony Dossee, v. Dwarkanath Biswas, 25 W. R., 335.

‡ Against the widow's power:—Mussamut Bhugbutty Daee v. Chowdry Bholanath, 24 W. R., p. 168.

For the widow's power:—Gonda Koer v. Kooer Ooodey Singh, 24 B. L. R., 159.

§ Mussamut Bhugbutty Dace v. Chowdry Bholanath, 24 W. R, p. 168.

‖ I. L. R. 2 Calc. 262, Soudaminy Dasey v. Jogesh Datt.

devolve on his widow, if he has no male issue ; but the joint family property will go to his male coparceners. The interest of a widow so succeeding to her husband's estate is similar to that of a tenant-in-tail by the English law as representing the inheritance. An important principle is here established, *viz* ., the distinction between the self-acquired property and the joint family property in an undivided family governed by the Mitacshara, the former will descend to the widow, but the latter will go to the undivided coparceners.*

According to the Bengal and the Benares schools, there is no difference between the moveable and the immoveable property inherited by the widow; and her powers of alienation as regards both are restricted within very narrow limits.†

ALIENATIONS BY THE WIDOW.

The general rule of Hindu law is, that as regards the property inherited by the widow from her husband she is incompetent to alienate it except for *legal necessity*.‡

According to Jimutavahana any expenditure incurred which is useful to the late owner would come within the category of legal necessity, and would justify the widow's alienation.† The spiritual welfare of the late owner is here meant, or acts beneficial to the soul of the deceased in the next world. Acts of religion highly meritorious on the part of the widow may have no effect on the spiritual welfare of her late husband. Therefore, it has been held, that such acts, of which the religious efficacy benefits the widow and

* 9 Moore's I. A., 539, Katama Natchier v. The Raja of Sivagunga.

† Kasinath Bysack v. Hurrosoondery Dassee, Montrion's Cases, 495 ; Bhag-wandeen Dobey v. Mayna Bace, 11 Moore's I. A. 487. There is an earlier case, (Mussamut Thacoor Dace v. Rai Buluck Ram, 11 Moore's, 139) wherein the Privy Council expressed a somewhat different opinion as to widow's power over moveable property, but that case seems to have been over-ruled (though not expressly) by the later one.—*Ed.*

‡ Dayabhaga, Chap. XI., sec. i., para 61.

§ Daya-crama-Sangraha, Chap. I., sec., II., paras 3 and 6 ; Daya-bhaga, Chap, XI., sec. I., paras. 56 and 62 ; Vyavahara Mayukha, Chap. IV., sec. VIII., para. 4.—*Ed.*

not the husband, will not justify an alienation of the property inherited by the widow.* Hence it was held, that a widow could not endow an idol which her husband's property to the detriment of the reversioners.

The first case of legal necessity justifying alienation by the widow is her own maintenance. If, however, the reversioners for the time being provide the widow with her maintenance, there is no necessity for the widow to sell either the whole or a portion of the estate inherited by her. A sale by the widow under such circumstances will therefore be invalid, the necessity justifying a sale being wanting.†

If the income of the husband's estate is insufficient to maintain those person whom the widow is bound to maintain, then the widow will be justified in alienating a portion of such estate to defray the expenses of such maintenance, and the sale taking place under those circumstances will stand good and cannot be impeached by the reversioners.

The marriage of unmarried daughters is one of the objects for which the Hindu law allows the widow to alienate a portion of her deceased husband's estate; consequently a debt contracted for this purpose should be a charge on the estate of the deceased, and not on the widow personally.‡

But the most important case in which the widow is allowed to alienate the property is for the purpose of conferring spiritual benefits of her late husband. For performing her husband's *sraddha*, the widow, therefore, is entitled to alienate either a portion or the whole of the inheritance, and the alienation is allowed whether it be for performing the *ekodista sraddha* (that is first *sraddha* performed on the eleventh day after death among Brahmins, and on the thirty-first day after death among Sudras,) or the other *srad-*

* Kartic Chunder Chuckerbutty v. Gour Mohun Roy, 1 W. R., 48; *See* Huro Mohun Adhikaree v. Aluckmoney Dossee, 1 W. R., 252; Runjeetram Koolal v. Mahomed Waris, 21 W. R., 49.

† 2 Macnaghten, 211.

‡ Preagnarain v. Ajodhya Prosad, 7 Sel. Rep, 602.

dhas of the deceased that are performed six monthly or annually or at stated days in the year. These ceremonies performed, directly benefit the deceased, and the widow is, therefore, bound to perform them.

For performing the other obligations of religion, it would appear that the widow is allowed to alienate a small portion of the inheritance.*

A pilgrimage to Gya, for the purpose of performing the husband's *sraddha* there, is considered a legal necessity justifying the alienation by the widow.† Pilgrimage to Benares, however, is not legal necessity.‡

The payment of the husband's debts is another instance of necessity justifying the widow's alienation of her husband's property.§ The widow, however, is not justified in alienating the property for the payment of her personal debts, unless those debts were the consequence of prior debts, owing by her husband. As for instance, where the widow executes a bond for the payment of her husband's debts, or in renewal of a bond due from him. In such cases the liability of the widow is not personal; the estate of the husband is liable, and property sold for such debts by the widow will be valid as against the reversioner. The widow will convey a good title to the alience.

The widow, however, it has been held, is not justified in selling her husband's property to pay a debt, due from her husband, which has been barred by the Statute of Limitations. The payment of such a debt is not a legal necessity, and a sale on account of it is not justifiable.‖

Debts incurred by the widow for preserving the estate, and the payment of such debts, would warrant an alienation

* 4 Sel. Rep., 420; 1 Sel. Rep., 82; 1 Sel. Rep., 215; 4 Sel. Rep., 147.
† Mahomed Ashruf v. Brijessuree Dossee, 19 W. R., 426.
‡ Huromohun Adhikari v. Aluckmoney Dessee 1 W. R., 252.
§ See Haris chunder Roy v. Nandalal Dutt. S. D. A. Dec. for 1862, Goonomonee Debee v. Bhugbutty Dossee, S. D. Rep. for 1845, p. 299.
‖ Melgirappa v. Shevappa, 6 Bom. Rep., 270.

of a portion of the estate, and would be treated as a legal necessity.*

Payment of revenue due to Government will justify an alienation when the same cannot be met from other sources.†

Advances made to the widow for her own maintenance and for the costs of carrying on a litigation to recover the estate of her husband have been held to be legitimate charges on the estate, which will bind the reversioner.‡

Money borrowed by the widow to carry on litigation will not be a charge on the estate, unless it be for the benefit of the estate.§

But if money is advanced to a widow, after due and proper enquiry, for carrying on a litigation to realise her husdrnd's estate, the amount so advanced shall be a charge upon the estate binding on the reversioners.‖

The widow is authorised to make gifts to her husband's relatives at his funeral obsequies; and this for the purpose of securing his spiritual welfare, the gifts being in proportion to the estate of her husband. The widow, however, as a rule, is precluded from making gifts to the family of her own father. The author of the Dayabhaga, however, has laid down that, with the consent of her husband's relatives, the widow may bestow gifts on the kindred of her own father and mother.¶

If the widow alienates her husband's property for other than allowable causes, the purchaser is entitled to possession of the property purchased, and to acquire in the property all the rights which the widow possessed; and the alienation

* Shekh Mulcoolah v. Radhabinode Misser, S. D. R. for 1856,
† Sreenath Roy v. Ruttanmala Chowdhrain, S. D. R. for 1859, p. 421.
‡ Grose v. Omertonioyee Dossee, 12, W. R., 12 O. J. A.
§ Mussamut Phool Koor v. Debee Persaud, 12 W. R., 187.
‖ Grose v. Omertomoyee, 12, W. R., 12, O. J. A.
¶ Dayabhaga, Chap. XI., sec. I., para. 64.

shall stand good during the period of the widow's natural life.*

When a sale by a Hindu widow is questioned, the purchaser is bound to show that the transaction is within her limited powers.† Where the legal necessity is questioned, its existence must be shown by the person standing on the conveyance.‡

Generally, it may be said, that a purchaser from the Hindu widow does not occupy the same position as any other purchaser in whose favor certain presumptions will be raised under ordinary circumstances. A purchaser from the Hindu widow has an exceptional and onerous position. He must show strict good faith in his dealings with her. By law the widow has a limited power of alienation over the property inherited by her; her disability is general, her ability exceptional; and the presumption of good faith will not, therefore, be raised in favor of the purchaser, who must prove the same when it is questioned.

Though a purchaser for value is not bound to prove the antecedent economy or good conduct of the widow who alienates a portion of her husband's estate, or to account for the due appropriation of the purchase money, he is bound to use due diligence in ascertaining that there is some legal necessity for the loan; and he may be reasonably expected to prove the circumstances connected with his own particular loan.‖

Though the purchaser is bound to prove the existence of a legal necessity when the widow's sale is questioned, he is not

* Mayaram Bhakram v. Motiram Gobindram, 2 Bom. H. C. Rep., 331; Tariny Churn Banerjea v. Nund Coomar Banerjea, 1. W. R., 47; Bogooa Jha v. Lall Dass. 6 W. R., 36; Ranee Prosonno Mooyee v. Ram Chunder Sen, S. D. R. for 1859, 163; Gobind Monee Dossee v. Sham Lall Bysack, W. R., Sp. No. p. 165.

† The Collector of Masulipatam v. Cavaly Vencata Narainapah, 8 Moore's I. A., p. 529.

‡ Bissonath Roy v. Lall Bahadur, 1 W. R. 247; Rajluckhee Debee v. Gocool Chunder Chowdry, 12 W. R., 47, P. C. R.

‖ Gobind Monee Dossee v. Sham Lall Bysack, Gap. No. W. R., p. 153.

bound to look to the actual appropriation of the purchase-money by the widow.* The mere fact of the whole of the purchase-money not being paid to the creditors will be no ground for invalidating the sale.† but whether the purchase-money is adequate, is for the purchaser to prove. The sale being questioned on this ground, the purchaser is bound to show that the consideration-money paid by him represents a fair value of the property purchased.‡

It has been held, having regard to the rights of the reversioners, that an alienation of a part of or a charge upon the estate, for the purpose of preserving the whole estate will be valid as against the reversioners, because by such an act the widow benefits the reversioners.

A widow, by relinquishing her estate in favor of the apparent next takers, can convey an absolute to the alience unimpeachable by any other reversioner.§ The surrender must be in favor of *all* those persons who stand in the position of next takers to her. If the surrender is in favor of some of the next takers to the exclusion of others of the same class, such an act will not be valid, because the excluded person will be entitled to complain, and, as against him the alienation will not be good. But if the surrender is in favor of the *second* reversioner with the consent of the *first* reversioner, it passes an absolute title.‖

When the widow incurs a liability, and it is incurred not for satisfying a legal necessity, but on any other account, a decree obtained against the widow on the basis of such an

* Gunga Gobind Bose v. S. M. Dhunee. 1 W. R., 59; Nuffer Chunder Benerjee v. Gudadhur Mundle. 3 W. R., 122; Gopal Chunder Manna v. Gourmonee Dassee, 5 W. R., 52.

† Ram Gopal Ghose v. Bullodeb Bose, Gap. No., W. R., 385.

‡ Jodu Nath Sircar v. S. M. Soramoney Dossey, Wyman's Rep. 70.

§ Jadumoni Debi v. Saroda Prosonno Mukerjee. 1 Boulnois Rep., 120; Protap Chunder Chowdry v. S. M. Joymonee Debee 1 W. R., 98; Shama Sundaree v. Surat Chunder Dutt, 8 W. R., 500; Kalee Coomar Nag v. Kashee Chunder Nag, 2, Wym., 212; Rojonikant Mitter v. Pranchand Bose, Marshall, 211.

‖ Protap Chunder Roy v. S. M. Joymoney Debee, 1 W. R., 98.

obligation will not bind the estate of her husband, and the sale under it will be a sale of her life-interest.* On the other hand, if the debt was incurred for a legal necessity, the the whole estate would pass upon a sale in execution of such a decree.† Is, however, the decree is obtained against the widow in her representative character, either as the representative of her husband or as the guardian of her minor son, the sale under it will pass the whole estate.‡

Where the decree is obtained against the widow as representative of her husband, *i. e.*, on account of a debt due from her late husband,—the estate of the husbadd will pass to the purchaser, and not the mere life-interest of the widow; and this although the sale-notification might state that the interest of the judgment-debtor, *viz.*, the widow, was sold.§ In such a case what property was actually sold is to be seen, and not the form of the sale-notification, and as the debts were the debts of the former owner, the husband of the widow, the sale will pass the rights of the former owner.‖

When a decree for rent is obtained against a widow as the possessor of a *tálook*, and in execution of that decree, the defaulting tenure was sold, the effect of such a sale will be to pass to the purchaser not merely the life-interest of the widow, but the whole tenure.¶ This is because the zemindar has the right, either by express agreement or by law, in case of a default in the payment of rent, to sell the tenure as constitued at the time of its creation, irrespective of the rights of the holder of the tenure for the time being.$

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* Kisto Moyee Dosee v. Prosunno Narain Chowdry, 6 W. R., 303.
† Bistoo Behary Sahoy v. Lalla Byjnath Persad, 16 W. R., 49.
‡ Goluck Chunder Paul v. Mahomed Rohim, 9 W. R., 316.
§ Kalee Churn Mitter v. Sheebdyal Tewaree, S. D. A. for 1839, p. 996; Buksh Ali v. Eshan Chunder Mitter, W. R., Sp. No. 119.
‖ General Manager of the Raj Durbhunga v. Mohara j Coomar Romaput Sing, 14 Moore's I. A., 605.
¶ Anund Moyee v. Mohendra Narain Doss, 15 W. R., 264; Mohima Chunder Roy Chowdry v. Ram Kissore Acharjee Chowdry, 23. W. R., 174.
$ *See* Rajkissen Sircar v. Chowdry Jaheerlal Huq, Sup. No. W. R., 351.

THE RIGHTS OF THE REVERSIONERS.

The persons whose interests are affected by the widow's alienations being the reversioners, it is reasonable to hold that, if they give their consent to such alienations, the alienations will be valid; and this, for two reasons—*first*, because the consent of the reversioner will be evidence of the existence of necessity justifying alienation; and *second*, because the reversioner, by giving his consent to the alienation, will be estopped from questioning its validity afterwards. Therefore, independent of the question of legal necessity, the widow's alienations will be absolutely valid if the reversioners have given their consent to such transactions.†

The doctrine of consent is founded upon the presumption that, when the reversioner gives his consent to the widow's alienation, he has satisfied himself that the transaction was one which the widow was, under the circumstances, justified in entering into; in other words, that it was not a wanton act on the part of the widow, but that it was one for which there was legal necessity.‡

It has been held in some cases§ that, if a reversioner gave his consent to an alienation, and died during the widow's life-time, his heirs will be bound by such consent.

The consent of the reversioner to the widow's alienation may be given in various away. The mere attestation of the widow's deed of alienation by the reversioners is not conclusive evidence of their consent. In the case of Raj Lukhee Debee *v.* Gocool Chunder Chowdry$ will be found the following

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† Gocul Chunder Chuckerbutty v. Musst. Rajranee, 2 Sel. Rep., 213; Hem Chunder Mozoomdar v. Musst. Taramunee, 1 Sel. Rep., 481; Brindabun Chunder Rai v. Bishun Chund Rai, 4 Sel. Rep. 180; Musst. Rejoya Debee v. Musst. Unnopoorno Debee, Note, 1 Sel. Rep., 215; Rajlukhee Debee v. Gocool Chundar Chowdry. 12 W R., 47, P. C. R.

‡ Kali Mohun Deb v. Dhunonjoy Saho, 6 W. R., 51; The Collector of Masulipatam v. C. V. Narainapah, 8 Moor's I. A., 529, 550.

§ Runjeetram Koolal v. Mahomed Waris, 21 W. R., 49; See also Cally Chand Dutt v. John Moor, 1 Fulton, p. 73.

$ 12 W. R., 47 P. C. R.

remarks of the Privy Council:—"Their Lordships cannot affirm the proposition that the mere attestation of such an instrument by a relative necessarily imports concurrence. It might, no doubt, be shown by other evidence that, when he became an attesting witness, he fully understood what the transaction was, and that he was a concurring party to it; but from the mere subscription of his name that inference does not necessarily arise."

SUITS BY REVERSIONERS.

The Courts of this country, and also the Privy Council, have held,* from a long time, that the reversionary heirs, though their interest is only contingent, have a right to maintain a suit to restrain waste by the widow. The reversioners may, in a suit against the alience obtain a declaration that the alienation was without legal necessity, and, therefore, void beyond the widow's life-time.† When the suit is brought after the widow's death, it takes the form of a prayer for declaration and for possession.

The suit is for a declaration that the widow's alienation was invalid, must be brought by the *next* reversioner.

A suit by the *second* reversioner during the life-time of the first reversioner will not lie.‡ A petition of disclaimer filed by the *immediate* reversioner in the suit brought by the *second* reversioner will render the suit by the latter maintainable.§

When the widow has sold, and the whole of the consideration-money was appropriated to the payment of necessary

* Ujjulmoni Dassee v. Sagormoni Dassee, 1 Taylor and Bell, p. 370; Haridas Dutt v. Rangomoni Dassee, Vyavstha Darpana, Eng. Ed., p. 124; Rajlukhee Debee v. Gocul Chunder, 13 Moore's I. A., 209, 224.

† See. 42 Act I. of 1877, iii. *(e)*

‡ Ramdhone Buksi v. Punchanun Bose, S. D. Dec. for 1853, p. 641; Jadoomoni Debee v. Saroda prosonno Mukerjee, 1 Boulnois, Rep., p. 120; Gogun Chunder Sen v. Joydurga, S. D. A., Decisions for 1859, p. 620.

§ Rojonikant Mitter v. Prem Chund Bose, Marshall, 241.

expenses, the sale will be *valid* as against the reversioner. But when the alienation was not necessary, and the consideration was appropriated by the widow to her own use, the sale is *invalid*, and the reversioner will be entitled to have the sale set aside without being required to refund the purchase money. If, however, the sale was partly *necessary* and partly *unnecessary*, it will be set aside only when the reversioner agrees to refund* that portion of the purchase-money which was appropriated to the necessary expenses of the widow. The reversioner must also pay reasonable interest to the purchaser upon the said sum, and the purchaser must account to the reversioner the rents and profits of the property during the time that it was in his possession, both the interest and the account of rents and profits to run from the date of the widow's death.† Such a principle is perfectly equitable; the reversioner's rights are protected, and the purchaser is not unnecessarily endamaged.

If the widow sold for legal necessity when the money could have been raised by a mortgage, it was *held*,‡ that the reversioner cannot set aside the sale without placing the purchaser in the same position as that in which he would have been if the widow had mortgaged instead of selling. In the same case, PEACOCK, C. J., expressed a doubt whether such a sale could at all be set aside. He thought that, if the widow elected to sell when it would be more beneficial to mortgage, the sale could not be set aside as against the purchaser, if the widow and the purchaser are both acting honestly; and the reason assigned for this conclusion is, that the interest of the money raised by the mortgage must be paid out of the estate, and thus the income of the widow would necessarily be reduced for the benefit of the reversionary heirs.

* Phool Chund Lall *v.* Rughoobun Sahye, 9 W. R., 108.
† Moteeram Kumar *v.* Gopal Sahoo, 20 W. R., 167.
‡ Phool Chand Lall *v.* Rughoobun Sahye, 9 W., 108.

If there is a mortgage on the property by the last owner at the time when the widow alienates the property, the reversioner can recover the property from the hands of the purchaser only by paying the amount of the money due on the mortgage.*

There might be circumstances under which the reversioner will be justified in suing to *remove* the widow from possession and the Courts will be justified in granting such a relief. A Court will not be justified in removing the widow from possession of the estate when she is only guilty of an alienation in excess of her powers as a Hindu widow—an alienation which is only binding during the widow's life-time, but which is not binding on the reversioners.† To justify the Court in adopting this extraordinary remedy, there must be, on the part of the widow, something more than a mere alienation—some distinct act of waste—or some positive act of fraud, to injure the interest of the reversioners, must be made out. For instance if the widow attempted to sell the property, alleging a debt of her husband which she could not otherwise pay and it appeared that this representation of the widow was false, that there was no debt of her deceased husband to pay, and that this was a mere pretence for alienating the property from the reversioners,—in such a case the widow will be removed from possession. It was clearly a fraudulent and collusive attempt on the part of the widow to create evidence which, if true, would be binding on the reversioners.‡

If the first reversioner does not sue, the second has a right to maintain the suit, on showing that the first reversioner is implicated in the alleged fraud or waste.§

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* Moulvie Mohamed Shumshool Hooda v. Shewakram, *alias* Roy Doorga Persad, 22 W. R., 409.

† Pranputty Kooer v. Futteh Bahadur, 2 Hay's Rep., 608; Brindu Chowdrain v. Peary Lal Chowdry, 9 W. R., 46.

‡ Moonshe Chasimuddeen v. Ram Dass Gossain, 2 W. R., 170; Shama Sundry Chowdrain v. Jumoona Chowdrain, 24 W. R., 86; Radha Mohun Dhur v. Ram Dass Dey, 3 B. L. R., 362; Gunesh Dutt v. Musst. Lall Mutee Kooer, 17 W. R., 11.

§ Kooer Golab Sing v. Rao Kureem Sing, 14 Moore's I. A., 193.

The removal of the widow from possession of the estate does not deprive her of the substantial rights of property. Beyond being deprived of possession, she is not deprived of any of the other advantages of property. She continues proprietor as before; and the Court appoints some person (usually the next reversioner) as manager or receiver to take charge of the property and to account for the rents and profits of the same to the Court, which it holds for the benefit of the widow, and makes over to her periodically.*

Under the old Civil Procedure Code (Act VIII of 1859) it was held that a reversioner's interest was not saleable in execution† of a decree. The present Code of Civil Procedure (Act X. of 1877, sec. 266, clk.) has expressly provided that such rights are not saleable in execution.

If the reversionary heir, however, voluntarily sells his reversionary right, a Court of Equity will compell him to fulfil his contract on his succeeding to the estate.‡

MAINTENANCE OF THE WIDOW.

The widow, when she is not an heiress, is entitled to maintenance according to all the authorities; and it is to be provided her by those persons, who have inherited the property which belonged to her late husband. The obligation to maintain the widow is, therefore, not a personal one; it is a sort of a charge upon the property of her husband in the hands of the heir.§ This, however, does not preclude the widow from obtaining a personal decree on account of her maintenance against the person who is bound to provide her with it. A decree for maintenance is not generally a personal decree against the defendant, but is a decree against him, so far as he is in possession of the assets belonging to

* Mussamut Moharanee v. Nudn Lal Misser, 10 W. R. 73.

† Koraj Koonwar v. Komul Koonwar, 6 W. R. 34; Ram Chundro Tantrodoss v. Dhurmo Narain Chuckerbutty, 15 W. R. 17, B., Bhoobun Mohun Banerjo v. Thacoor Dass Bishwas, 2 Indian Jurist N. S. 277.

‡ *Per* PHEAR, J in Ram Chundro Tantrodoss v. Dhurmo Narain Chucker butty, 15 W. R. 17 F. B.

§ Bhoirub Chuder Ghose v. Nobo Chunder Gooho, 5 W. R. III, C. R.

the widow's husband, and for that reason liable to satisfy the decree for maintenance.* Therefore, a suit brought by the widow against her husband's brother or other relatives, for maintenance, must be dismissed, if it is shown that the defendant inherited no property from the husband of the widow.† The widow of a deceased member of a joint family is entitled to claim maintenance from her father-in-law, and her brother-in-law,§ as her husband's interest in the family property passes to them. The maintenance of a son's widow has been held by the Calcutta High Court to be a mere moral duty on the part of her father-in-law, which in case of a breach, is not enforceable in a Court of law.‖

If the heir had taken the property of the widow's husband, he is primarily responsible, both in person and property, for the widow's maintenance. He cannot resist the widow's claim by saying, that the property out of which the widow is entitled to be maintained is no longer in is hands, but that it has been transferred and passed into some other hands. On this point it was observed by the High Court of the North-Western Provinces that "the heir who takes and becomes possessed of the estate of the deceased, must be held to continue to be primarily responsible, both in person and property, for the maintenance of the widow, even thought he should have fraudulently transferred that estate, or otherwise have improperly wasted it; and the widow is bound to look to the heir for the maintenance, and to claim if from him primarily, rather than from the estate transferred or wasted which may, nevertheless, resort answerable to her claim.§

The widow, who is guilty of unchastity, is not entitled to

* Tarunginee Dasee v. Choudry Dwarka Nath Musant, 20 W. R., 196.
† Khetramoni Dasee, v. Kasi Nath Dass, 10 W. R., 89, F. B; see Sabitra Bai v. Lukshmi Bai, I. L., R. 2 Bom., 573; Mad. Dec. for 1859. pp. 5, 265, 272 Roma Bai v. Trimbuck Gunesh, 9 Bom., H. C., 283.
§ Must Lalti Kuar v. Gunga Bis hun. 7, N.-W. P. H. C. 261.
‖ Khetra Moni Dasee, v. Kashea Nath Dass. 10 W. R., 89. F. B.
§ Ram Chunder Toraun v. Mutt. Jasoda Kuar, 2 N.-W. P., Rep., 134.

claim maintenance from the heirs of her husband.* If she is guilty of unchastity during her husband's lifetime, she cannot claim maintenance after his death. If the widow is guilty of improper conduct, such as having eloped from the residence of her husband, she forfeits her right to future maintenance from the heir of her husband.†

If the widow who has been receiving maintenance from the heirs of her husband becomes unchaste, it has been held that she will be deprived of her maintenance.‡

The Bombay High Court has ruled, that a widow getting maintenance under a decree will not be deprived of it by the fact of subsequent incontinence.‖

The widow's right of maintenance cannot be defeated by anything short of gross misconduct on her part, or a testamentary or a nuptial gift on the part of the husband. The husband can not defeat her right of maintenance by an *express* clause in the will. The widow's right of maintenance arises by marriage, it is not a matter of contract;§ it exists during the husband's lifetime, and continues after his death. It is a legal obligation attaching upon himself personally, and upon his property after his death. He cannot free himself of this obligation during his life-time, nor can his heir after his death so far as he inherits his property; and a devise of the property will not authorise the devisee to hold the property free from the widow's claim to maintenance, when neither the testator nor his heir could have resisted such a claim. It has been held, that, in Bengal, a widow has no indefeasible vested right in the properay left by her husband, though she has, by virtue of her marriage a right, if all the property be willed away, to maintenance.¶

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* 2 Macnaghten, 112.
† Ranee Basunt Kumaree v. Ranee Kumul Kumaree, 7 Sel., Rep. 168.
‡ Kerry Kolitanee v. Moneram Kolita, 19 W. R., 405; *per* Jackson, J.
‖ Honama v. Turnamabhat, I. L. R., 1 Bom., 559.
§ Sidlingapa v. Sidava, I. L. R., 2 Bom., 624.
¶ Bhubnnmoyee v. Ramkissore, S. D. D. of 1860, p, 489. See also Sonatun Bysack v. S. M. Juggut Soondaree Dasee. 8 Moore's I. A. 66.

The obligation of the widow to reside with her husband's family is now treated as a mere moral one, and the infringement of the same by the widow does not carry with it any penalty.*

Where a person purchases property without notice of the existence of the widow's right of maintenance as a *charge* upon the said property, it has been held, that the property in his hands will not be liable for such maintenance.† The amount of maintenance must be determined beforehand, either by decree or by contract, and made a charge upon the property conveyed, before the same in the hands of a *bona fide* purchaser for consideration can be made liable for it.‡

Where the widow has obtained a decree fixing a certain sum as her maintenance, to be obtained out of certain property, it was held that she has a right to have this amount declared as a charge upon the property into whosesoever hands it may come.‖

Where property was confiscated by the Crown on account of rebellion, it was held that the widow of the former owner, whose sons, the then owners of the property, were guilty of rebellion, was entitled to maintenance from Government out of the property which had been confiscated.§

The Bombay High Court has ruled that, to make the purchaser liable for the widow's maintenance, it must be shown that he was a party to the fraud which the heir was practising upon her to deprive her of her maintenance.¶

The amount of maintenance to which the widow is entitled is generally a question of fact. The amount of the family property is always an element in the consideration of this

* Aholya Bai Debia v. Lukhee Monee Debia, 6 W. R., 37.
† Srimati Bhogobati Dasi v. Kanailal Mitter, 8 B. L. R., 225.
‡ Jugger Nath Samunt v. Maharanee Adhiranee Narain Koomari, 20 W. R., 126.
‖ Koomari Debia v. Roy Luchmeeput Sing, 33 W. R., 33.
§ Mussamut Golab Koonwar v. The Collector of Benares, 4 Moor's I. A., 246.
¶ Lukshman Ram Chundra v. Satyabhama Bai, I. L. R., 2 Bom., 494, 524.

question; as also the number of other persons whose wants and necessaries are to be met out of the family property and other obligations that there are upon the said property.

The amount of maintenance which is awarded to a widow may sometimes be varied; as, where the family property is reduced subsequent to the date of the award of maintenance, the defendant may apply to the Court to have the amount of maintenance reduced on that ground.* On the same principle, the widow may apply for the enhancement† of the amount if the assets increased.

Where a Hindu widow has received certain property as and for her maintenance, she cannot, when she has exhausted it, enforce from the relatives of her husband, or from the family estate, a further allotment or a money allowance for maintenance.§

How far the widow is entitled to claim arrears of maintenance in a suit declaring her right to it, has sometimes been raised. It is not necessay that there should be a demand and refusal to entitle her to claim arrears. Without a previous demand and refusal, she will, nevertheless, be entitled to it. A demand is not necessary to create her right to it.‖

There may be cases in which the circumstances are such that her claim to arrears will be disallowed. Long neglect on her part to claim the same, and the fact of her being maintained by her parents or other near relatives, without her being obliged to incur any expense on account of it, will probably be grounds on which a Court will be justified in disallowing her claim to arrears of maintenance.¶

In addition to her right of maintenance, the widow is

* Ruka Bai v. Ganda Bai, I. L. R., 1 All, 591.
† Sreeram Bhattacharjee v. Puddomookhee Debee, 9 W. R., 152.
§ Sabitri Bai v. Luxmi Bai, I. L. R., 2 Bom., 573.
‖ Jivi v. Ramji, I. L. R., 3. Bom, 207; Sukuer Bai v. Bhovanji, I Bom. H. C. Rep., 194; Vancapadya v. Kavari Hengasee, 2 Mad. H. C. Rep., 56.
¶ Ahollya Bai Debia v. Lukhee monee Debia, 6 W. R., 37.

entitled to reside in the family dwelling-house of her husband. The son or other heir cannot turn her out of the same without providing for her a suitable residence elsewhere: nor is the purchaser from the heir entitled to turn her out of the family residence.* The same principle was maintained by the Allahabad High Court, where it was held,† that the purchaser from the nephew was not entitled to evict the widow of his vendor's uncle from the dwelling-house, in a part of which she was living from the time of her husband.‡

The widow is entitled to a share of the family property, in case of a partition, among her sons or other heirs, of the same. The share which the widow gets is equal to that of each of her sons.‖ She obtains it in lieu of her maintenance.

The *mother* is entitled to a share, not the *step-mother*.§ Therefore, if the step-mother is childless, she will only get maintenance. The share of the mother is contributed by *her* sons from their portion of the inheritance.¶ Where a Hindu died, leaving six sons, one of them was by his first wife, who was dead; the remaining five sons by his second wife, who was living; and third a wife, who was childless was living. On a partition among the six sons, it was ordered that the son whose mother was dead shall get one-sixth of the estate, the remaining five-sixths to be divided into six equal parts, of which the five sons and their mother shall get one share each. But it was further ordered, that *before* any partition be made, the Master do enquire and report

* Mungala Debi v. Dinonath Bose, 12 W. R. 35, A. O. J.
† Ganri v. Chaudra Moni, I. L. R., 1 All., 262.
‡ Bhigham Dass v. Pura, I. L. R., 2 All., 141.
‖ Dayabhaga, Chap. III, Sec. II, para. 29; Pran Kissen Mitter v. Mntto Sundery Dasee, Fulton., 389.
§ Dayabhrga, Chrp. III, Sec. II, para. 30.
¶ Issur Chunder Carformah v. Gobind Chunder Carformah, Macn. Cons of Hin. Law, 74.

what would be a requisite sum for the purpose of securing a suitable maintenance for the childless widow, and that the said sum be, in the first instance, set apart for the purpose.* Where property was divided between four sons, three of them the sons of one wife, and the fourth the son of the second wife, it was held, that the property will be devided into four equal parts, of which one share will go to the only son of the second wife, who will get no share, but will be entitled only to maintenance from her son. The remaining three shares to be again divided into four equal parts, of which the three sons and their mother shall take one share each.†

In the same way, the grandmother is entitled to a share when the partition is made between her *sons* and *grandsons*, but the right of the great grand-mother to a share is nowhere admitted‡, though she is declared entitled to maintenance.

THE RE-MARRIAGE OF WIDOWS.

Act XV. of 1856 of the Governor-General in Council provides for the re-marriage of Hindu widows and declares that the issue of such marriage shall be legitimate. It also provides that, rights of inheritance or of maintenance, which the female heir possesses in the property of the late owner at the time of her re-marriage, shall cease and determine upon her re-marriage; but a right of property conferred by will, when larger then the widow's estate under the Hindu law, shall not so determine.‖ She is not to be deprived of any rights *accruing after* her re-marriage. Where, therefore, the son died *after* his mother had re-married, she was held entitled to succeed him as his heir.§ The Act also provides

* Seeb Chunder Bose v. Gooroo Prosaud Dose, Macn. Cons. of Hin. Law. 62
† Srimati Jeomoney Dasee v. Attaram Ghose, Macn. Cons. of Hin. Law. 64.
‡ Macn. Cons. of Hin. Law, 28. See also Gooroo Prosaud Bose v. Shib Chunder Bose, Macn. Cons. of Hin. Law, 29.
‖ See II. 5 of Act XV of 1856.
§ Okhorah Soot v. Bheden Bariance. 10. W. R., 34; 11. W. R., 82; *See* also Musst. Rupan v. Hukmi Singh, Punjab Customs, 99.

for the guardianship* of the children of the deceased husband on re-marriage of his widow. Few marriages among the high caste Hindus have taken place in accordance with the provisions of the Act. But there is a custom, only among the very lowest classes of Hindus, of re-marrying their widows. In the Presidencies other than Bengal, these marriages have obtained a recognised footing. Such marriages are called *Pat* among the Maharattas, and *Natra* in Gurzerat.† This kind of union is also allowed to woman who are *wives*, and who are separated from their husband by a sort of divorce, which is allowed under certain specified circumstances; as for instance, when the husband is proved to be impotent, or the parties continually quarrel, or where the marriage was irregularly concluded, or where by mutual consent the husband breaks his wife's neck ornament, and gives her a *char chittee*.‡

Where a widow enters into this form of a *Pat* marriage, she is obliged to give up all she inherited from her first husband to her husband's relations; she is allowed to retain only what was given to her by her parents.‖ This is in the Bombay Presidency; and the same principle has been applied by the Madras High Court to the case of the second marriage of a Maraver woman.§ The custody of the children, except infants, also belongs to the representatives of the first husband.¶ The children of *Pat* widows are never considered illegitimate. They are legitimate equally with those by their first marriage.

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* Sec. III.

† Steele, pp. 26, 168; *See* Rahi v. Gobinda Valad Teja, I. L. R., 1 Bom, 97.

‡ Steele, p. 169.

‖ Steele, p. 169; West and Buhler, p. 99; Harkoonwar v. Hutton Bace, 1 Borradaile, 431; Treckumjee v. Mt. Laro, 2 Borradaile, 361.

§ Murugayi v. Viromakali, I. L. R., 1 Mad. 226.

¶ Steele, p. 169.

RELIGIOUS AND CHARITABLE ENDOWMENTS.

(*Mayne, pp. 401—406.*)

§ 359. GIFTS for religious and charitable purposes were naturally favoured by the Brahmans, as they are everywhere by the priestly class. Sancha lays down the general principle that "wealth was conferred for the sake of defraying sacrifices" (*a*). Gifts, for religous purposes are made by Katyana an exception to the rule that gifts are void when made by a man who is afflicted with disease and the like, and he says that if the donor dies without giving effect to his intention, his son shall be compelled to deliver it (*b*). This is an exception to the rule that a gift is invalid without delivery of possession. The Bengal pandits state that this principle applies even against a son under the Mitakshara law, though his assent would be indispennsable if the gift was for a secular object; they seem, however, to limit the application of the rule to a gift of a small portion of the land (*c*). In Western India grants of this nature have been held valid; even when made by a widow, of land which descended to her from her husband, and to the prejudice of her husband's male heirs (*d*). And so a grant by a man to his family priest, to take effect after the life estate of his widow, was decided to be good (*e*).

Religious gifts favoured.

Effected by will.

§ 360. The principle that such gifts can be enforced against the donor's heirs, would naturally slide into a practice of making them by will (§ 337). It is probable that as Brahmanical acuteness favoured family partition as means of multiplying family ceremonies, so it fostered the testamentary

(*a*) 3 Dig. 484.

(*b*) 2 Dig. 96. See Manu, ix. 324; Vyasa, 2 Dig. 189; Mitakshara, i. 1. § 27, 32.

(*c*) See futwah, Gopal Chund v. Babu Kunwar, v. 4 S. D. 24 (29); Mitakshara i. 1. § 28.

(*d*) Jugjeevun v. Deosunkur, 1 Bor. 394 [436]; Kupoor v. Sevukram, *ib.* 405 [4 48]; but see Umbashunker v. Tooljaram, 1 Bor. 400 [442]; Muhaluk-mee v. Kripashookul, 2 Bor. 510 [457]; Ramanund v. Ramkissen, 2 M. Dig. futwah, at p. 117. See too, *post* § 542.

(*e*) Keshoor v. Mt. Rankoonwur, 2 Bor. 314 [345.].

power as a mode of directing property to religious uses, at a time when the owner was becoming indifferent to its secular application. Many of the wills held valid in the Supreme Court of Calcutta have been remarkable for the large amounts they disposed of for religious purposes (*f*). In one case arising out of *Golukchunder Carformah's* will, where practically the whole property had been assigned for the use of an idol, the Court declared the will proved, but wholly inoperative, except as regards a legacy to the step-mother of the testator (*g*). Sir F. MacNaghten suggests that the will might properly have been cancelled, as, upon its face, the production of a madman. No reason can be offered why such a will should be set aside in Bengal, merely because the whole property was devoted to religious objects. In the case of *Radhabullubh Tagore* v. *Gopeemohun Tagore*, which was decided in Calcutta the very next year (1811), the right of a Hindu so to apply the whole of his property, seems to have been admitted (*h*),

Superstitious uses not forbidden,

§ 361. The English law, which forbids bequests for superstitious uses does not apply to grants of this character in India, even in the Presidency Towns (*i*), and such grants have been repeatedly enforced by the Privy Council (*k*). Nor are they invalid for transgressing against the rule which forbids the creation of perpetuities. "It being assumed to be a principle of Hindu law that a gift can be made to an idol, which is a *caput mortuum*, and incapable of alienating, you cannot break in upon that principle by

nor perpetuities.

(*f*) F. MacN. 323, 331, 336—347, 349, 350, 371; Ramtonoe v. Ramgopal 1 Kn. 235. The same thing was remarked by Sir Thomas Strange as a feature in the wills made by Hindus in Madras. 2 Stra. H. L. 453.

(*g*) F. MacN. Appx. 58.

(*h*) F. MacN. 335.

(*i*) Das Merces v. Cones, 2 Hyde, 65; Andrews v. Sokim. 2 B. L. R., (O. C. J.) 148; Judah v. Judah, 5 B. L. R. 433; Khusalchand v. Mahadevgiri, 12 Bom. H. C. 214.

(*k*) Ramtonoo v. Ramgopal, 1 Kn. 245; Jewun v. Shah Kubeerood-deen, 2 M. I. A. 390; S. C. 6 Suth. (P. C.) 3; Sonatom Bysack v. Juggutsoondree, 8 M. I. A. 66; Juggutmohini v. Mt. Sokheemoncy, 14 M. I. A. 282; S. C. 10 B. L. R. 19; S. C. 17 Suth. 41.

Colourable religious endowment.

engrafting upon it the English law of perpetuities (*l*)." In fact both the cases in which the Bengal Highcourt in 1869 set aside the will as creating secular estates of a perpetual nature, contained devises of an equally perpetual nature in favor of idols, which were supported (*m*). But where a will under the form of a devise for religious purposse, really gives the beneficial interest to the devisees, subject merely to a trust for the performance of the religious purposes, it will be governed by the ordinary Hindu law. Any provisions for perpetual descent, and for restraining alienation, will, therefore, be void. The result will be to set aside the will, as regards the descent of the property, leaving the heirs-at-law liable to keep up the idols, and defray the proper expenses of the worship (*n*). *A fortiori* will this rule apply, where the estate created is in its nature secular, though the motive for creating it is religious (*o*).

Tenure in trustee.

§ 362. As an idol cannot itself hold lands, the practice is to vest the lands in a trustee for the religous purpose, or to impose upon the holder of the lands a trust to defray the expenses of the worship (*p*). Sometimes the donor is himself trustee. Such a trust is, of course, valid, if perfectly created, though, being voluntary, the donor cannot be compelled to carry it out if he has left it imperfect (*q*). But the effect of the transaction will differ materially, according as the property is absolutely given for the religions object, or merely burthened with a trust for its support. And there will be a further difference where the trust is only an apparent, and not a real one, and where it creates no rights in any one except the holder of the fund.

(*l*) *Per* Markby, J., Kumara Asema v. Kumara Kishna, 2 B. L. R. (O. C. J.) p. 47.

(*m*) Togore v. Tagore, 4 B. L. R. (O. C. J.) 103, in the P. C., 9 B. L. R. 377; S. C. 18 Suth. 359; Krishnaramani v. Ananda, 4 B. L. R. (O. C. J.) 231.

(*n*) Promotho v. Radhika, 14 B. L. R. 175; Phate v. Damoodar, 3 Bom. 81.

(*o*) Anantha v. Nagamuthu, 4 Mad. 200.

(*p*) See futwah in Koulna Kant v. Ram Huree 4 S. D. 196, (247).

(*q*) See Lewin, Trusts, p. 61.

Trust imperfect.

§ 363 The last case arises where the founder applies his own property to the creation of a pagoda, or any other religious or charitable foundation, keeping the property itself, and the control over it, absolutely in his own hands. The community may be greatly benefited by this arrangement, so long as it lasts, but its continuance is entirely at his own pleasure. It is like a private chapel in a gentleman's park, and the fact that the public have been permitted to resort to it, will not prevent its being closed, or pulled down, provided there has been no dedication of it to the public. It will pass equally unencumbered to his heirs, or to his assignees in insolvency. He may diminish the funds so appropriated at pleasure, or absolutely cease to apply them to the purpose at all (*r*). In short, the character of the property will remain unchanged, and its application will be at his own discreation.

Property held under trust.

Another state of thing arises where land or other property is held in beneficial ownership, subject merely to a trust as to part of the income, for the support of some religious endowment. Here again the land descends and is alienable, and partible (*s*), in the ordinary way, the only difference being that it passes with the charge upon it (*t*).

Absolute dedication of property.

The remaining case is the one first named, where the whole property is devoted, absolutely and in perpetuity, to the religious purposes. Here, of course, the trustee has no beneficial interest in the property, beyond what he is given by the express terms of the trust. He cannot encumber or dispose of it for his own presonal benefit, nor can it be taken

(*r*) Howard *v.* Pestonji. Perry, O. C. 535; Venkatachellamiah v. P. Narainapah, Mad. Dec. of 1853, 104; S. C. Mad. Dec. 1854, 100; Chemmanthatti v. Meyene, Mad. Dec. of 1862, 90; 2 W. MacN. 103; Brojosoondery v. Luchmee Koonwaree, in the P. C., 15 B. L. R. 176, (note); S. C. 20 Suth. 95; Delroos v. Nawab Syud, 15 B. L. R. 167, affirmed in P. C. 3 Cal. 324; Sub nomine, Asbgar v. Delroos.

(*s*) Ram Coomar v. Jogender, 4 Cal. 56.

(*t*) Mahatab v. Mirdad 5 S. D. 268 (313), approved by P. C. 15 B. L. R. p. 178; sup note (*r*) Futtoo v. Bhurrut, 10 Suth. 299; Basoo v. Kishen, 13 Suth. 200; Sonatum Bysck v. Juggutsoondree, 8 Mad. I. A. 66.

in execution for his personal debt. But he may do any act which is necessary or beneficial, in the same manner and to the same degree as would be allowable in the case of the manager of an infant heir. He may, within those limits, incur debts, mortgage and alien the property, and bind it by judgments properly obtained against him (*u*). And he may lease out of the property in the usual manner, but he cannot create any other than proper derivative tenures and estates conformable to usage; nor can he make a lease, or any other arrangement which will bind his successor, unless the necessity for the transaction is completely established (*v*).

Powers of trustee.

Devolution of trust.

§ 464. The devolution of the trust, upon the death or default of each trustee, depends upon the terms upon which it was created, or the usage of each particular institution, where no express trust-deed exists (*w*). Where nothing is said in the grant as to the succession, the right of management passes by inheritance to the natural heirs of the donee, according to the rule, that a grant without words of limitation conveys an estate of inheritance (*x*). The property passes with the office, and neither it nor the management is divisible among the members of the family (*y*). Where no

(*n*) Prosunno v. Golab, 2 I. A. 145; S. C. 14 B. L. R. 450; Konwur v. Ramchunder, 4 I. A. 52; S. C. 2 Cal. 341; Kalee Churn v. Bungshee, 15 Suth. 339; KhusalChand v. Mahadevgiri, 12 Bom. H. C. 214; Fegredo v. Mahomed, 15 Suth, 75. In Bombay it has been held that although the rents of a religious endowment may be alienated, the corpus of the property is absolutely inalienable; Narayan v. Chintaman, 5 Bom. 393. This is no doubt the general rule, but see *per curiam* 4 I. A. p. 62.

(*v*) Radhabullabh v. Juggutchunder, 4 S. D. 151 (192); Shibessouree v. Mothooranath. 13 M. I. A. 270; S. C. 13 Suth. (P. C.) 18; Juggessur v. Roodro, 12 Suth. 299; Tahboonissa v. Koomar, 15 Suth, 228; Arruth v. Juggurnath, 18 Suth. 439; Mohunt Burm v. Khashee, 20 Suth. 471; Bunwaree v. Mudden, 21 Suth. 41.

(*w*) Greedharee v. Nunkhishore, Marsh. 573; affd., 11 M. I. A. 428; S. C. 8 Suth. (P. C.) 25; Muttu Ramalinga v. Perianyagum. 1 I. A. 209. See various cases collected, 1. M. Dig. 330.

(*x*) Chutter Sein's case, 1 S. D. 180 (239); Venkataehellamiah v. P. Narainapah Mad. Dec. of 1853. 104. See Tagore case, 4 B. L. R. (O. C. J.) 182; 9 B. L. R. (P. C.) 395; S. C. 18 Suth. 359.

(*y*) Jaafar v. Aji 2 Mad. H. C. 19; Kumarsami v. Ramalinga, Mad. Dec. of 1860, 261.

arrangement or usage exists, the management may be held in turns by the several heirs (*z*). Sometimes the constitution of the body vests the management in several, as representing different interests, or as a check upon each other, and any act which alters such a constitution would be invalid (*a*). Where the head of a religious institution is bound to celibacy, it is frequently the usage that he nominates his successor by appointment during his own lifetime, or by will (*b*). Sometimes this nomination requires confirmation by the members of the religious body. Sometimes the right of election is vested in them (*c*). In no case can the trustee sell the right of management, though coupled with the obligation to manage in conformity with the trusts annexed thereto (*d*); nor is the right saleable in execution under a decree (*e*).

Founder's right.

S. 365. Unless the founder has reserved to himself some special powers of supervision, removal, or nomination, neither he nor his heirs have any greater power in this respect than any other person who is interested in the trust (*f*). And such powers, when reserved, must be strictly followed (*g*). But where the succession to the office of trustee has wholly

(*z*) Nubkissen v. Hurrischunder, 2 M. Dig. 146. Anundmoyee v. Boykantnath, 8. Suth. 193; Ramsoondur v. Tarück, 19 Suth. 28; Mitta Kunth v. Neerunjun, 14 B. L. R. 166; S. C. 22 Suth. 437. There is nothing to prevent a female being manager. See Moottoo Meenatchy v. Villoo, Mad. Dec. of 1858, 136. Joy Deb Surmah v. Huroputty, 16 Suth, 282. *See* Hussain Beebee v. Hussain Sherif, 4 Mad, H. C. 23; Punjab Customs, 88; unless, the actual discharge of spiritual duties is required; Mujavar v. Hussain, 3 Mad. 93. Special custom is necessary, Janokee v. Gopaul, 2 Cal. 365.

[*a*] Rajah Vurmah v. Ravi Vurmah, 4 I. A. 76; S. C. 1 Mad. 235.

[*b*] Hoogly v. Kishnanund, S. D. of 1848, 253; Soobramanya v. Aroomooga Mad. Dec. of 1858, 33; Greedharee v. Nundkishore, 11 M. I. A. 405; S. C. 8 Suth. [P. C.] 25.

[*c*] Mohunt Gopal v. Kerparam, S. D. of 1850, 250; Narain v. Brindabun, 2 S. D. 151 [192]; Gossain v. Bissessur, 19 Suth, 215; Madho v. Kamta, 1 All. 539.

[*d*] Rajah Vurmah v. Ravi Vurmah, 4 I. A. 76; S. C. 1 Mad. 235, overruling Ragunada v. Chinnappa, 4 Mad, Rev. Reg. 109.

[*e*] Durga v. Chanchal 4 All. 81.

[*f*] Tcertaruppa v. Soonderajien, Mad. Dec. of 1851, 57; Lulchmee v. Rookmanee, Mad. Dec. of 1857, 152.

[*g*] Advocate-General v. Fatima, 9 Bom. H. C. 19.

failed, it has been held that the right of management reverts to the heirs of the founder (*h*).

Trust irrevocable.

A trust for religious purposes, if once lawfully and completely created, is of course irrevocable (*i*). The beneficial ownership cannot, under any circumstances, revert to the founder or his family. If any failure in the objects of the trusts takes place, the only suit which he can bring is to have the funds applied to their original purpose, or to one of a similar character (*k*).

[*h*] Jai Bansi v. Chattar, 5. B. L. R. 181; S. C. 13 Suth. 396; Sub nominee. Peet Koonwar v. Chuttur; but see Act XX of 1863: [Native Religious Endowments]; Phate v. Damodar, 3 Bom. 84; Hori Dasi v. Secy. of State, 5 Cal. 228.

[*i*] Juggutmohini v. Sokheemoney 14 M. I. A. 289; S. C. 10 B. L. R. 19; S. C. 17, Suth. 41; Punjab Customs, 92.

[*k*] Mohesh Chunder v. Koylash, 11 Suth. 443; Reasut v. Abbott. 12 Suth. 132; Nam Narain v. Ramoon, 23 Suth, 76; Atty-Gen. v. Brodie, 4 M. I. A. 190; Mayor of Lyons v. Adv.-Gen. of Bengal, 3 I. A. 32; S. C. 26 Suth. 1 See Act XX of 1863. Panchcowrie v. Chumsoolall, 3 Cal. 563. Brojomohun v. Hurrolall, 5 Cal. 700; see as to suits by devotees or others interested in Religious trust; Radhabhai v. Chimnaji, 3 Bom. 27; Dhadphale v. Gurav, 6 Bom. 122. As to suits by or with the permission of the Advocate-General, see Civil Pro. Code X of 1877, s. 539, XIV of 1882. s. 539. As to suits for the removal of the trustee on the ground of impoper conduct, see Mohun v. Lutchmun, 6 Cal. 11.

THE LEGAL CONSEQUENCES OF MARRIAGE.

(Extracts from the Tagore Law Lectures, 1878, pp. 113—196.)

Nature of the marriage contract under the Hindu law.

Marriage in that law (Hindu Law) is not merely a contract but also a sacrament; and the rights and duties of the married parties are determined solely by that law, and are incapable of being varied by their agreement. As Menu emphatically declares, "neither by sale, nor desertion, can a wife be released from her husband."* Following the spirit of this rule, the High Court of Bengal, in the case of *Seetaram* v. *Mussamut Aheeree Heeranee*, said; "It is contrary to the policy of the law to allow persons by a contract between themselves to avoid a marriage on the happening of any event they may think fit to fix upon."†

Custody of an infant wife.

The custody of an infant wife belongs, as a rule, not to her parents, but to her husband. In the case of *Kateeram Dokaneev. Mussamut Gendhenee and others*,‡ Mr. Justice Markby observed: "The marriage of an infant being under the Hindu law a legal and complete marriage, the husband, in my opinion, has the same right as in other cases to demand that his wife shall reside in the same house with himself. I do not think that any Court can deprive the husband of his right except upon some tangible and definite grounds, which show that, under the special circumstances of the case, the wife is absolved from this duty, and her parents or guardians from the duty of surrendering her to her husband; and we cannot, in my opinion, say, without contravening the Hindu law, that infancy of a wife constitutes such a ground, though it might, I think, be right in the case of a very young girl to require the husband to show that she would be placed by him under the immediate care of some female member of his family." Where, however, a well-established custom exists for a child-wife to

* IX, 46. † 20 W. R, 49. ‡ 23 W. R, 178.

remain away from her husband, and not to come to live with him in his house until a certain event has occurred,' such custom has been recognized by the Court.*

By the Acts relating to the guardianship of minors (Act XL of 1858, section 27, and Act XX of 1864, section 31) it is provided that nothing in these Acts shall authorize the appointment of a guardian of the person of a female whose husband is not a minor.

When the husband is himself a minor, his guardian would, as a rule, be also the guardian of the wife. This would follow from the rule that after the husband's death, his nearest kinsman is the guardian of the widow in preference to her father or any of her paternal relations.† But in exceptional cases, the Courts, as representing the sovereign who is the universal guardian in Hindu law,‡ may allow an infant wife during the minority of her husband to remain under the guardianship of her parents in preference to that of her husband's relations.

Remedy of the husband against infringement of marital rights.

Such being the rights which the husband acquires by marriage over the wife's person, the next question is how they are to be enforced in case of infringement.

Where the wife is an infant, and the husband seeks to have her in his custody, the proper course is to proceed according to the provisions of Act IX of 1861. The husband may also by a civil suit obtain an injunction upon any person detaining his wife, to abstain from putting any obstruction in the way of the wife's returning to her husband; but no order can be made upon such person directing him to send the wife to her husband.‖

* Suntosh Ram v. Gera Pattuck, 23 ; W. R., 22 ; see also Steele, pp. 29, 165.

† Colebrooke's Digest, Bk. IV, 13 ; Macnaghten's Precedents of Hindu Law, Ch. VII, Cases i and iii.

‡ Manu, VIII, 27, 28.; Colebrooke's Digest, B. K. V, 450—453.; 1 Strange, 71.

Lall Nath Misser v. Shoeburn Pandey, 20 W. R., 90. But See Hurka Shuukur v. Racejee Munohur, 1 Borr., 353; 1 Morley's Digest, 288, pl. 11.

Where the wife is qualified by her age to perform her conjugal duties, the proper remedy for the husband is a suit for restitution of conjugal rights. It was at one time doubted whether such a suit would lie in the Civil Courts of India, and the ground for such doubt was the difficulty of enforcing the performance of conjugal duties in their detail; but the point has been settled by the decision of the Privy Council in the case of *Moonshee Buzloor Ruheem v. Shumsoonnissa Begum.** In that case the Judicial Committee observed: "Upon authority then, as well as principle, their Lordships have no doubt that a Mussulman husband may institute a suit in the Civil Courts of India for a declaration of his right to the possession of his wife, and for a sentence that she *return to cohabitation*, and that that suit must be determined according to the principles of the Mahomedan Law. The latter proposition follows not merely from the imperative words of Regulation IV of 1793, section 15, but from the nature of the thing. For since the rights and duties resulting from the contract of marriage vary in different communities, so especially in India, where there is no general marriage law, they can be only ascertained by reference to the particular law of the contracting parties." Though the case was one between Mahomedans, the rule laid down evidently applies *mutatis mutandis* to the Hindus, and it has been so applied.† But the form of the decree in such suits, and the mode of executing it, have been points for some controversy. It seems to have been sometimes held,‡ that the decree should direct the delivery of the wife bodily into her husband's hands, and the language of article 34 of the second schedule of the Limitation Act (1877) which provides for suits for the recovery of a wife, might perhaps be referred to as favoring

Restitution of conjugal rights.

* 8 W. R., P C., 3; or 11 Moore's Indian Appeals, 551.

† Kateeram Dokanee v. Mussamut Gendhenee, 23 W. R., 178.

‡ Hurka Shunker v. Racejee Munohur, 1 Borr., 353, cited in 1 Morley's Digest, 288, pl. 11.

such a view. But the provisions of the Limitation Law are no safe guide in such matters; and it may now be taken as settled that the proper form of the decree should be this; "that the plaintiff is entitled to his conjugal rights, and that his lawful wife, the defendant, be ordered to return to his protection."*

Cases in which restitution of conjugal rights is

Though, as a rule, either spouse is entitled to a decree for restitution of conjugal right against the other, there are cases in which such decree will not be granted. Thus, where a custom binding upon a particular class or caste is established, by which the husband is not to cohabit with his wife untill a second ceremony is gone through after marriage, a claim for restitution of conjugal rights will not be enforced where such ceremony has been neglected.†

How far cruelty and ill-treatment would be an answer to a suit for restitution of conjugal rights is an important practical question. Judging from the precept of Manu that even the worst husband is to be revered as a god,‡ it might seem that cruelty and ill-treatment would not excuse a wife's non-performance of conjugal duties. But the Hindu law is not really so cruel. It excuses a wife who is averse from a husband who is a lunatic, or a deadly sinner, or an eunuch, or a person afflicted with any loathsome disease.§ Following this spirit of the Hindu law, the High Court of Bombay in one case‖ refused to decree restitution of conjugal rights in favor of a husband who was suffering from leprosy and syphilis.

It is not every unkind act that would disentitle a husband to enforce his marital rights. The mere taking of a

* Koobur Khansama v. Jan Khansama, 8 W. R., 467; Chotun Bebee v. Ameer Chund, 5 W. R., 135.

† Bool Chand Kalta v. Mussamut Janokee, 24 W. R., 228; 25 W. R., 386, V. 154.

§ Manu, IX. 76.

‖ Bai Premkuvar v. Bhika Kullianji. 5 Bom., A. C. J., 209.

wife's jewels or the marrying of a second wife, has been held to be no bar to a Hindu husband's claim for restitution of conjugal right.* In *Moonshee Buzloor Ruheem* v. *Shumsoonissa Begum*, their Lordships of the Privy Council observed: "It seems to them clear that if cruelty in a degree rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back. It may be, too, that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the wife, might, if properly proved, afford good grounds for refusing to him the assistance of the Court. And as their Lordships have already intimated, there may be cases in which the Court would qualify its interference by imposing terms on the husband."†

The question, what constitutes legal cruelty sufficient to bar a claim for restitution of conjugal rights, has been very fully discussed by Mr. Justice Melvill in *Yamuna Bai* v. *Narayan Moreshvar Pendse*,‡ and the conclusion arrived at is, that the Hindu law on the question of what is legal cruelty between man and wife would not differ materially from the English law; that to constitute legal cruelty there must be actual violence of such a character as to endanger personal health or safety, or there must be reasonable apprehension of it; and that mere pain to the mental feelings, such for instance as would result from an unfounded charge of infidelity, however wantonly caused, or keenly felt, would not come within the definition of legal cruelty.

Where a husband had ill-treated a wife on account of a favorite mistress, and had agreed to separate from the wife, and had refused her maintenance during the period of sepa-

* Jeebo Dhon Banyah v. Mussamut Sundhoo, 17 W. R., 522; see also Verasvami Chetti v. Appasvami Chetti, 1 Mad., 375; Sitanath Mookerjee v. Sreemutty Haimabutty Dabee, 24 W. R., 377.

† 11 Moore's Indian Appeals, 615; 6 W. R., P. C., 15.

‡ 11 L. R., 1 Bom., 164.

ration, it was held that he was not entitled to insist upon restitution of conjugal rights.*

Conjugal infidelity in a wife would bar her claim for restitution of conjugal rights. The Hindu law allows a disloyal wife to be forsaken.†

Effect of change of religion on the claim for restitution of conjugal rights.

A party who has renounced Hinduism is not entitled to enforce a claim for restitution of conjugal rights against a husband or a wife who remains a Hindu. The Hindu law allows one to forsake a degraded husband; or a degraded wife,‡ and degradation from caste is a natural consequence of apostacy. Act XXI of 1850 by enacting that loss of caste or change of religion shall not inflict on any person forfeiture of *rights* or property, seems to throw some doubt on the point. But the remarks of Mr. Justice Campbell in *Muchoo v. Anoop Sahoo*§ go a great way in support of the rule stated above. After holding that the right to the custody of children is right within the meaning of Act XXI of 1850, the learned Judge observed:

"The pleader for the appellant further argued that no one can be permitted so to use his right as to deprive any other person or persons of *their* rights. For instance, he says, a husband who becomes a Christian will not be permitted to claim the person of a wife who remains a Hindu. This is so far true, and in this case, the claim to wife was rightly dismissed; but was, I think, dismissed simply for the reason, that, admitting the husband's *primâ facie* claim to the custody of the wife, that claim may be defeated by a reasonable plea. If a wife pleads that her husband beats and ill-uses her in such a way that she cannot reasonably be required to live with him, and that plea is made out, doubtless the Court will not enforce a restitution of conjugal rights. So also, if she pleads that the husband, by

* Moola v. Nundy and Mussumat Poonia, 4 N. W. P., 109.
† Colebrooke's Digest, Bk. IV, 79, 80.
‡ Colebrooke's Digest, Bk. IV, 58, 62, 151.
§ 5. W. R., 235.

change of religion, has placed himself in that position that she cannot live with him without doing extreme violence to her religious opinions and the social feelings in which she has been brought up, and in the enjoyment of which she married, that plea would also be a good plea."

So, Sir Adam Bittleston on one occasion said:*

"So far, however as Hindoo law is concerned, it seems to me enough to say that, in my opinion, a Hindoo married woman who deserts her husband, becomes a convert to Mahomedanism, and adopts the habits and lives as the wife of a Mussulman, is altogether out of the pale of Hindoo Law; that she ceases to have any recognized legal *status* according to that law, which counts her as one dead, or at least recognizes her existence only as an object of charity. This is not inconsistent with such passages as that cited from Manu: 'That neither by sale nor desertion can a wife be released from her husband;' which certainly have reference to persons still within the pale of Hindu law. It seems to me, however, at variance with the spirit of Hindu Law, to hold that it concerns itself with a woman in such case, as far as to impose on her any obligation not to marry again, *provided the second husband be not a Hindu*; and if she does marry again, the validity of that marriage must, I think, depend upon the law of the sect to which she has become a convert."

But I must tell you that the decisions of our Courts have not been uniform on this point. Thus in one case,† Sir W. Burton is reported to have ordered the wife of a converted Brahman to be restored to him upon *habeas corpus*; and in another case,‡ the Agra Sudder Court held that loss of caste

* Rahmed Beebee *v.* Hokoya Beebee, 1 Norton's Leading Cases on Hindu Law, 12.

† *In re* the Wife of P. Sreenivassa, 1 Norton's Leading Cases on Hindu Law, 13.

‡ Mussumat Emurtee *v.* Nirmul, N. W. P. Rep., 1864, p. 583.

by a husband could not dissolve his marriage, or bar his claim to the possession of the wife's person.

Considering, however, the feelings of those who really profess the Hindu faith, it would be a matter of extreme hardship, to say the least, to enforce restitution of conjugal rights in such cases; and I should therefore venture to affirm that the view taken by Mr. Justice Cambell is the proper view of the matter.

Act XXI of 1866.

The case in which a Hindu husband or wife becomes a convert to Christianity, is provided for by Act XXI of 1866. Under that Act, a convert can sue a native husband or wife for conjugal society, and in case of refusal by such husband or wife to cohabit with the convert, on the ground of change or religion the marriage between the parties shall be declared dissolved.

For suits for the restitution of conjugal rights, the period of limitation is two years, from the time when such restitution is demanded and refused, the party refusing being of full age and sound mind.*

Damages for seduction of wife.

Adultery and acts of adulterous inclination being crimes in Hindu law, it is maintained by Macnaghten, Colebrooke, and Ellis, that an action for damages will not lie against the wrong-doer.† The last-named authority observes that though it is no doubt equitable to allow the husband to recover his marriage expenses against the seducer, yet there is no such remedy prescribed by the Hindu law, and that such cases ought to be governed only by that law. Sir T. Strange was, however, of a contrary opinion. According to him, a civil action for criminal conversation would lie, the case not being one which is to be governed by the Hindu law.‡ He cites a case in which the Pandit's opinion allows the plaintiff to recover his marriage expenses from the adulterer.§ The Bom-

* Act IX of 1872, 2nd Schedule, No. 42; Act XV of 1877, 2nd Schedule, No. 35.

† Macnaghten's Principles of Hindu Law, p. 61; 2 Strange, pp. 49-44.

‡ 1 Strange's Elements of Hindu Law, p. 46.

§ 2 *Ibid*, 41.

bay Sadr Court in one case awarded damages to the plaintiff who sought to recover his wife from the defendant who had enticed her away ;* and in *Soodasun Sain* v. *Lockenauth Mullick*, reported in Montriou's Cases of Hindu Law, p. 619, the Supreme Court of Calcutta held, that a civil action for criminal conversation was maintainable between Hindu parties. With reference to the special damage to be alleged in such cases, the learned editor in a note remarks : "It was suggested that in the case of a Hindu plaitiff, the loss of caste, or pollution of the zenana, and the like, might be laid as special damage in the declaration. In the instance of a koolin brahmin with 100 wives, some of whom he may never have seen more than once, the allegation of the loss of the wife's society would not perhaps be strictly applicable."

Remarriage.

The next point for notice is the capacity of parties to marry again during the continuance of a former marriage. In this respect the Hindu law is, no doubt, very much in favor of the stronger sex.

It prohibits the wife to marry again during the lifetime of the husband ; and even after his death, she was not, until the passing of the Widow Marriage Act, considered competent to remarry.† And even where there is a custom among the lower castes for a wife to contract a second marriage, called a *natra* or *pat*, during the lifetime of the husband, on permission obtained from a *punchayet* of her own caste, the Courts of British India have refused to recognize such custom, on account of its being immoral and opposed to the spirit of the Hindu law, and have held the parties to such remarriage liable to punishment under the Indian Penal Code, as guilty of offences relating to marriage.‡ Where, however, a Hindu

* Hurka Shunkur v. Raeejee Munohur, 1 Borr. 353, cited in 1 Morley's Digest, 288, pl. 11.

† See the texts cited in Vidyasagar's 2nd Tract on Polygamy, pp. 100—109, 199—204 ; see also Udvahatattwa. Inst. of Raghunandana, Vol. II, pp. 32, 63 ; Shama Churn's Vyavastha, Darpana, p. 647 ; Manu V. 157.

‡ See Steele, pp. 159, 168 ; Reg. v. Karsan Goja, 2 Bom., 124 ; Uji v. Hathi Lalu, 7 Bom., A. C. J., 133 ; Reg. v. Sambhu Raghu. I. L. R., 1 Bom , 347.

married woman deserts her husband, becomes a convert to Mahomedanism, and marries again, her case will not be governed by the Hindu law which regards her as dead.* So where either party becomes a convert to Christianity, and is repudiated by the other, the convert may obtain a decree declaring the marriage dissolved, and then by Act XXI of 1866, section 19, the wife, whether a convert or a Hindu, shall be competent to marry again, and the issue of such remarriage is declared to be legitimate, notwithstanding any provision of the Hindu law to the contrary.

Remarriage of a convert to Christianity relapsing to Hinduism.

A somewhat curious case once arose regarding a Hindu's right of remarriage. A Hindu who had become a convert to Christianity, and had married according to the Christian form, became again a professing Hindu, and married a Hindu woman in the Hindu form; and the question was raised whether for this he had been rightly convicted of bigamy. The High Court of Madras answered this question in the negative, on the ground that the second marriage was not void by reason of the wife by the first marriage being still alive, as the Hindu law which governed the prisoner's second marriage, would ignore the first marriage altogether.†

Divorce allowed by custom in some cases.

But though not allowed by the general Hindu law, divorce and remarriage of a divorced wife are in some cases permitted by custom.‡ Such custom, however, prevails only among the inferior classes, especially in the Bombay Presidency.§ and disputes concerning this subject are generally settled by *punchayets* or caste assemblies. But it has been held that the Courts are not bound to recognize the authority of the caste to declare a marriage void, or to give permission to a woman to remarry.‖

* See Rahmed Beedee v. Rokeya Beebee, 1 Norton's Leading Cases, p. 12.
† 3 Mad., App. (Criminal Cases), vii.
‡ See Kudomee Dossee v. Joteeram Kolita, I. L. R., 3 Calc., 305.
§ 1 Strange, 52.
‖ Reg v. Sambhu Raghu, I. L. R., 1 Bom., 352.

The ground upon which such divorce is most commonly granted, is the mutual consent of the husband and the wife, the former granting the latter a *char chitti*, or letter of release.* Other grounds are mentioned by Steele† as justifying divorce among the inferior castes in Bombay, and these grounds are, impotence of the husband, continual quarrel, habitual ill-treatment, and any irregularity rendering the marriage *ab initio* null and void. Our Courts have accordingly held that with some castes divorce is allowable in case of ill-treatment.‡

But the prevailing practice has been not to recognize the validity of any divorce obtained without the consent of the husband.§ In *Reg* v. *Karsam Goja*,‖ which is the leading case on the point, the prisoner Karsan Goja had married and cohabited with one Rupa, a married woman, who had repudiated her former husband without his consent. Thereupon Karsan was tried for adultery, and Rupa for marrying again in her husband's lifetime, and their defence was, that by the custom of their caste, a woman might, without the consent of her husband, leave him and contract a valid marriage, called *natra*, with another man. They were both convicted, and the High Court of Bombay, in upholding the convictions, observed: "We are of opinion that such a caste custom as that set up, even if it be proved to exist, is invalid, as being entirely opposed to the spirit of the Hindu law; and we hold that a marriage entered into in accordance with such a custom is void." The same principle has been followed in several subsequent cases.¶

"Though the Hindu law does not allow divorce, it is not

* Steele, p. 197. † *Ibid*, pp. 168. 169.

‡ See Kaseeram Kriparam v. Umbaram Huree Chand, I Borr., 387; Kasee Dhoollub v. Ruttun Bace *Ibid* 410; cited in 1 Morley's Digest, 289, pls. 14, 14*a*.

§ See Dyaram Doolubh v. Bace Umba, 3 Morley's Digest, 181, pl. I; 1 W. & B., 92.

‖ 2 Bom., 117.

¶ Khemkor v. Amia Shankar, 10 Bom., 381; Rahi v. Govind, I. L. R., 1 Bom., 116; Narayan Bharthi v. Laving Bharthi, I. L. R., 2 Bom., 140.

so unreasonable as to compel married parties to live together as man and wife under all possible circumstances. In certain cases, as you have seen already, either spouse is permitted to resist the claim of the other for restitution of conjugal rights. This separation, called in Hindu law desertion (*tyag*), differs from divorce as ordinarily understood, in this,—that however grave or permanent the cause of the desertion, and however solemnly and irrevocably it may take place, it can never have the effect of dissolving the marriage tie completely, so long as both parties remain Hindus.*

Grounds which justify desertion of the husband.

Among other causes which justify desertion of the husband by the wife, may be mentioned cruelty of the husband, and his laboring under loathsome and contagious disease.† These have already been considered in the preceding lecture.

Change of religion a ground for desertion.

Change of religion in either spouse would justify desertion by other, and Act XXI of 1850, as I have already explained, would not interfere with such desertion.‡ In such cases, the convert partner is regarded in Hindu law as civilly dead.§ In the converse case, which is extremely rare, of a Hindu convert to Christianity or other faith, returning back to Hinduism on performance of the necessary expiation, it has been held that the Hindu law would altogether ignore the marriage of the party, contracted while a convert, and would authorize his marriage with a Hindu wife.‖ This decision, we are told by Sir Henry Maine¶ in his speech on the Indian Divorce Bill, has been the cause of the insertion of the provision in Act IV of 1869 (section 10) to the effect that a Christian wife may obtain divorce from

* See Manu, IX, 46.

† See Yamuna Bai *v.* Narayan Moroshvar Pendse. I. L. R., 1 Bom., 164; Bai Prem Kuvar v. Bhika Kalliranji, 5 Bom., A. C. J., 209.

‡ See Munchoo v. Arzoon Sahoo, 5 W. R., 235.

§ Rahmed Beebee v. Rokeya Beebee, 1 Norton's Leading Cases on Hindu Law, 12.

‖ 3 Mad. (Criminal Cases), App., vii.

¶ See Supplement to the *Gazette of India* for March 6, 1869, p. 595.

her husband by reason of his change of religion and subsequent marriage with another woman.

Act XXI of 1866.

Act XXI of 1866 has made some important provisions for dissolution of marriage when either spouse becomes a convert to Christianity. It authorizes the convert to sue his or her non-converted partner for conjugal society, and it gives the latter the option of agreeing or refusing to cohabit with the former; and in case of his or her refusal on the ground of change of religion, it directs the Court to declare the marriage dissolved.

Position of the wife who deserts or is deserted by her husband.

The position of the wife who lawfully deserts her husband, or is lawfully deserted by him, is in some resepects rather anomalous. So long as both parties remain Hindus, desertion does not dissolve their marriage.*

In the case of desertion of the husband by the wife, she must remain under the care of her grown-up sons, if any, or under the care of other kinsmen; for her state is one of perpetual tutelage.† As a rule, she is entitled to maintenance from her husband. Where degradation of the husband is the cause of desertion, the Hindu law, which excludes the degraded husband from inheritance, imposes upon the person taking his share of the patrimony the obligation of maintaining his wife if chaste; ‡ and now as by Act XXI of 1850 degradation or loss of caste no longer occasions any forfeiture of rights or property, it would follow that the wife is entitled to maintenance from her degraded husband, though she may not live with him.

When change of religion by the husband is the cause of desertion, the case seems to stand on somewhat different grounds. Change of religion, as observed by the Judicial Committee in *Abraham* v. *Abraham*,§ would release the convert from the trammels of the Hindu law; and his

* Manu, IX, 46. † Manu, IX, 3.
‡ Mitakshara, Ch. II, Sec. X, 14; Dayabhaga, Ch. V, 19.
§ 1 W. R. (P. C.), 5.

rights and duties would have mainly to be determined by the law of the sect to which he becomes a convert; and such law in some cases, as where the conversion is to Mahomedanism, would declare the former marriage dissolved.* Nevertheless, the adoption of a new religion ought not to have the effect of sweeping away all existing obligations. Considering that, by Act XXI of 1850, the Hindu convert is no longer to be deprived of his rights or property by reason of change of faith, and considering the feelings and the helpless condition of the Hindu wife, and the prohibition against her remarriage, it would be a matter of extreme hardship if she is to be deprived of her right to claim maintenance from her husband, whom, owing to her religious feelings, she may be obliged to forsake. The question is not one of Hindu law, but involves important general principles. The decision of the Madras High Court reported in 4 Mad. H. C. Rep., page iii, may be referred to, as favoring the wife's claim in such cases.

The case of conversion of the husband to Christianity has been expressly provided for by the Legislature. You have seen that the convert husband may, under Act XXI of 1866 sue the Hindu wife for conjugal society, and in the event of her persistent and voluntary refusal to cohabit with him on the ground of his change of faith, a decree may be passed declaring their marriage dissolved. After such decree, the wife, it seems, can have no claim for maintenance against her husband. The Act, however, on the whole, deals, equally with both parties, and it contains the following important provision:—

"When any decree dissolving a marriage shall have been passed under the provisions of this Act, it shall be as lawful for the respective parties thereto marry again as if the prior marriage had been dissolved by death, and the issue of any such remarriage shall be legitimate, any Native

* See Hedaya, Bk. II, Ch. v.

law to the contrary notwithstanding. Provided always that no minister of religion shall be compelled to solemnize the marriage of any person whose former marriage may have been dissolved under this Act, or shall be liable to any suit or penalty for refusing to solemnize the marriage of any such person." (Section 19.)

This, you will observe, is the only case in which a Hindu wife can obtain a complete divorce, being permitted not only to forsake her husband, but also to contract a valid and legal remarriage. But as such marriage cannot possess the sacramental character of the nuptial rite in the eye of the Hindu, and as the reproach of being a twice-married woman would still attach to the wife, this permission of remarriage is seldom if ever availed of.

A wife deserted by her husband is still entitled to some maintenance, even when the causes of desertion is her infidelity to the marriage bed. But in this last-mentioned case, her maintenance is limited to what has been called a *starving maintenance*, being mere food and raiment,* and is allowed only when she ceases to live in adultery.

If she is deserted by reason of her degradation, she is directed to dwell in a hut near the family house.† When her change of religion is the cause of desertion, she would no longer be bound by the rules of the Hindu law, and her legal position is to be determined by the law of the sect to which she becomes a convert.‡ If she embraces Christianity, the provisions of Act XXI of 1866 would enable her to marry again, after obtaining a decree for dissolution of her former marriage.

* See Colebrooke's Digest, Bk. IV, 81—83; Honamma v. Timanna Bhat, I. L. R., 1 Bom., 559.
† Manu, XI, 189.
‡ See Rahmed Beebee v. Rokeya Beebee, 1 Norton's Leading Cases on Hindu Law 12.

SUCCESSION TO THE PROPERTY OF PROSTITUTES.

(Tagore Law Lectures, 1878, pp. 403—407).

The earliest reported case on the point is that of *Taramunnee Dassee* v. *Motee Buneanee*,* a Bengal case. In that case a woman, who had lapsed into prostitution, having died leaving two prostitute daughters born after her degradation, and another daughter born in lawful wedlock, the last-named daughter, as guardian on behalf of her minor sons, sued the other daughters to recover her maternal estate. The Sudder Court put the following question to the Pandit:

"If a Hindu woman, who is an outcast in consequence of living by prostitution, die, and leave three daughters, one a married woman, and mother of several children, and respectable; the other two, prostitutes, who lived with the outcast mother, and had all things in common with her: which will inherit the mother's property?" The Pandit replied:—"The two prostitute daughters alone inherit whatever the mother may have left; because the relation of the married and respectable daughter to the outcast mother has been severed." Upon receipt of this reply, the Court affirmed the judgment of the Principal Sudder Ameen who had dismissed the plaintiff's claim. The opinion given by the Pandit in this case was recognized as correct by the High Court of Madras in *Myna Bai* v. *Uttaram*, in which the Court observed:†—"The Doctrine of Mr. Justice Strange in section 363 of his Manual is fully borne out by a dictum in the case quoted.‡ It was a suit by the daughter, born in wedlock of a mother, who afterwards lapsed into prostitution, to recover from the daughters born in prostitution the property of the mother. The

* 7 Sel. Rep., 273.
† 2 Mad., 202.
‡ Taramunee Dassee v. Motee Buneanee, 7 Sel, Rep., 273.

Court held the plaintiff's title not made out, because the conduct of the mother had entirely severed her from her natural family, so that the plaintiff, the daughter born in wedlock, could not succeed to her. There is also the dictum that the prostitute daughters are entitled to succeed, but the plaintiff's case failing this was not actually necessary to the decision. In Madras too it has never been doubted that the children of the porstitute succeed to the property of their mother. We have been unable to find the least authority either in the books or in practice, for an opinion of Mr. Justice Strange, that the children must be adopted children. The decisions upon the questions are not numerous, as indeed they seldom are, upon points so well established as to leave to the reckless litigants of this country no hope of benefit from contesting them. The newspaper report of a case in the High Court of Bombay contains the opinion of the Judges, in a case which did not call for it, that the Courts in future ought not to undertake the settlement of questions of inheritance between persons of the prostitute class and their offspring, whether natural or adopted. The Court however, admitted that their own precedents were in favor of doing so. The case was there one of an adopted daughter, and of course there would be much reason for contending that there was an intention to bring up the child, when so adopted, to prostitution. Even, therefore, if the case could be considered an authority, it would be none upon the present question.

"Our reasoning, therefore, is, that there is no authority against the existence of heritable blood between the woman and her illegitimate offspring."

In the case of *Kamakshi* v. *Nagavathnam*,* the question was raised whether on the death of one of two sisters, to whom the office of dancing-girl to a pagoda had passed

* 5 Mad, 161.

by right of successsion from their mother, the share of the deceased sister devolved on her daughter (the plaintiff) or the office with its emoluments passed in their entirely to the surviving sister (the first defendant). The Court in its judgment said:—

"There is no doubt that in Madras the issue of a dancing-woman are her legal heirs, and the Hindu law of inheritance appears not to warrant any distinction between the descent of her property and the descent of paternal property, except that daughters are placed before sons in the order of succession as in the case of the succession to *stridhanum*, and this without any qualification. Now as the property in dispute was not *stridhanum* of the plaintiff's mother and her sister, the 1st defendant (and for this position the recent decision of this Court in *Sengamathammal* v. *Valayuda Mudali*, 3 Madras H. C. Reports, 312, is a direct authority), the general rule must, we think, be considered to be that the children of dancing-women take by descent the estate of coparceners in their mother's property; their daughters as a class first, and on failure of daughters their sons as a class. There would not be a doubt about this being the nature of the estate in the case of sons succeeding, and in reason and principle we can see nothing on which to found any distinction as to the estate of inheritance which daughters take. The ordinary law of inheritance must, it appears to us, govern in both cases alike.

"The objection on the part of the appellant that the 1st defendant and her sister took a joint estate with rights of survivorship, was sought to be supported by an argument of analogy drawn from the rules of inheritance in the cases of several widows being heirs and of the succession of several daughters to the *stridhanum* of their mother. We are not prepared to lay down that in the latter case the right of survivorship to the exclusion of the children of a

deceased sister exists, but assuming that it does, the argument appears to us to be of no force. There is obviously no analogy between the present case and that of widows inheriting the estate of their husband; and as to the law of succession to *stridhanum* we think it a sufficient answer that it is a peculiar law, and its positive restriction to maternal property acquired in a particular manner precludes its being extended by analogy to a widely different kind of maternal property; the descent of which may be regulated by the ordinary law of inheritance."

From these cases it would appear that the rights of children of dancing-women to inherit their maternal property has been recognized by our Courts. The law on the subject has been summed up by Strange in his Manual of Hindu Law,* thus:—

I.—"The property of a dancing-girl will pass to her female issue first, and then to her male, as in the case of other females."

II.—"On failure of issue, the property of a dancing-girl will go to the pagoda to which she is attached."

III.—"With prostitutes, the tie of kindred being broken, none of their relatives who remain undegraded in caste, whether offspring or other inherit from them." "Their issue after their degradation succeed."

In Cunningham's Digest of Hindu Law† the broad rule is laid down that "the succession to dancing-women is the ordinary succession of Hindu heirs to family property, except that daughters are placed before sons in the order of succession." It is true that this is opposed to the second of the above rules quoted from Strange, which is based upon the opinion of the Sudder Pandits; but it is supported by the ruling of the Madras High Court in the case of *Kamakshi* v. *Nagarathnam* just referred to. Moreover, the correctness of the rule laid down by Strange seems open to question. There is nothing in the Hindu law in its support, the only escheat which that law allows, being one in favour of the Crown; and the rule can therefore be maintained only on the ground of its being based upon usage.

* P. 80, Sec. 361, 363. † P. 112.

BASTARD'S RIGHT TO INHERIT.

(Tagore Law Lectures, pp: 166—168.)

The position of illegitimate children in the Hindu law is somewhat different from their position in the English law. In the latter system, the bastard is regarded as a *filius nullius*, a son of nobody; and for purposes of inheritance, he has no legal relationship with any one in the ascending or the collateral line, and his only relations are his own legitimate descendants.* In the Hindu law the illegitimate son of regenerate man is always excluded from inheritance; but in the case of a Sudra, the illegitimate son of a particular description, namely, the son born of an unmarried female slave or slave's female slave, inherits his father's property.† This special rule in the case of Sudras, which Sir T. Strange‡ attributes to the contempt in which they are held by the Hindu law, is deduced by the leading commentators of all the schools from the following texts:—

"A son begotten by a man of the servile class on his female slave, or on the female slave of his slave, may take a share of the heritage if permitted: thus is the law established. (Manu, IX, 179.)

Even a son begotten by a Sudra on a female slave may take a share by his father's choice." (Yajnavalkya, II, 133.)

It has been sometimes maintained that the authorities would support the broad proposition that a Sudra's illegitimate son of every description would inherit to his father;§ and a slight inaccuracy which occurs in Colebrooke's translation of the Dayabhaga (Chap. IX, 29)

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* Stephen's Commentaries, Bk. III, Ch. III, 5th ed., Vol. II, 311.

† Mitakshara, Ch. I, Sec. XII, 1—3; Dayabhaga Ch. IX, 28—31; Vyavahara Mayukha, Ch. IV, Sec. IV, 29—32; Macnaghten's Precedents of Hindu Law, p. 15 note; Chotturya Run Murdun Syn v. Sahub Purlahad Syn, 4 W. R. (P. C.), 132; 1 Morley, 310, pls. 44—57; Datti Parisi Nayudu v. Datti Bangaru Nayudu, 4 Mad., 204.

‡ 1 Strange, 69.

§ 1 Strange, 69; Pandaiya Telaver v. Puli Telaver, 1 Mad., 478; but see the judgment of the Privy Council in that case, 12 W. R. (P. C.), 41.

favors such a view. But Mr. Justice Romesh Chunder Mitter, in his elaborate judgment in *Narain Dhara* v. *Kakhal Gain*,* has clearly pointed out this error, and deduced the correct rule given above, after a full examination of the authorities on the subject.

The meaning of the term female slave *(dasi)* in the above rule, has been the subject of much contention in our Courts, and the authorities are not unanimous on the subject. They seem, however, to favor the view that a "*female slave*" here means not necessarily a *slave* bought or taken captive but includes a continuous concubine, provided that the intercourse is neither adulterous nor incestuous.† The case of *Rahi* v. *Govinda Valad Teja*‡ may be referred to for a full exposition of the meaning of the term *dasiputra*, and of the law relating to the rights of an illegitimate son.

The question how far one illegitimate branch can inherit from another was raised in the case of *Myna Bai* v. *Uttaram*. The facts of that case were somewhat anomalous. An Englishman had two sons by a Brahman married woman who had deserted her husband and lived in adultery with him; and upon the death of one of these sons, the other claimed his estate as his heir. The Privy Council held§ that the parties had been rightly considered to be Hindus but remitted the case to India for further investigation as to collateral heirship under the peculiar circumstances of the case. Thereupon the High Court of Madras¶ held that illegimate sons could inherit the property of their mother and of one another.

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* 23 W. R., 334; I. L. R., 1 Calc., 1.

† Muttusamy Jagavira Yettapa Naikar v. Venkatasubha Yettia, 2mad., 293; and the same case on appeal to the Privy Council, 11 W. R. (P. C.), 6; Datti Parisi Nayudu v. Datti. Bengaru Nayudu, 4 Mad., 204; Vencatachella Chetty v. Parvatham, 8 Mad., 131.

‡ I. L. R., 1 Bom., 97.

§ 2 W. R. (P. C.), 4.

¶ 2 Mad, 196.

MAINTENANCE OF PARENTS.

(Tagore Law Lectures, 1878. p. 175.)

Maintenance of parents.

In the Hindu law, the son is as much bound to maintain his aged parents, as the father is, to support his infant children.*

If the latter duty is necessary, to be enforced for the preservation of our race, the former is equally necessary to be enforced for its happiness. The comprehensive character of the Hindu law of maintenance, which extends its protection not merely to the wife, the children, and the parents, but also to a number of other relations, has been sometimes cried down as inevitably tending to foster habits of indolence and dependence. But competent judges have justly commended it; and apart from sentimental considerations, it should be borne in mind that it is this law and the morality by which it is supported, that have saved our Government the trouble of enforcing that complicated system of poor laws, which is a social necessity in other countries.

According to Mr. Mayne, the parents, including the step-mother, and mother-in-law, are entitled to maintenance.†

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* Colebrooke's Digest, Bk. V. 77; Macnaghten's Precedents of Hindu Law, 113—115.

† (i) 2 W. MacN. 113, 118; W.&B., 88, 92; *per Norman* J, *Khetramani* v. *Kashinath*, 2 B. L. R. (A. C. J.) 15; S. C. 10 Suth. (F. B.) 93; Coop-pummal v. Rookmany. Mad. Dec. of 1855, 238. Per curiam, Savitribai v. Luximibai 2 Bom 597.

EXAMINATION QUESTIONS
WITH
APPROPRIATE ANSWERS.

(See Currie's Law Examination Manual, pp. 1 to 23.)

Q. *(a)* On what are the laws of the Hindus, civil and religious, believed by them to be founded. *(b)* On what do the rules of law which at the present day govern the lives and property of the Hindus depend. *(c)* To whom does the Hindu law apply. *(d)* And under what circumstances does a man cease to be amenable to it?

A. *(a)* On revelation, a portion of which has been preserved in the very words revealed, and constitutes the *Vedas*, esteemed by them as *Sacred Writ*. Another portion has been preserved by inspired writers, who had revelations present to their memory, and who have recorded the holy precepts for which a divine sanction is to be presumed. This is termed *smriti*, recollection (remembered law), in contradistinction to *sruti*, audition (revealed law). *(b)* They depend partly upon the doctrines received by the various schools of interpretation of the sacred text, and partly upon the usages which have obtained in particular classes or localities and are adapted to existing habits and customs, subject to such modifications, changes, and improvements, as have been, from time to time, introduced during the last century by the action of the English Legislature and the decisions of English Courts. *(c)* The Hindu law has obligatory force *only* upon those who are Hindu both by birth and by religion. *(d)* When a Hindu changes his religion, and shows, by his course of conduct after such change what rules and customs he has adopted, he is released from the Hindu law, and thenceforth

governed by the law and usage of the class with which he has associated himself. (Abraham *v.* Abraham, 9 Moore's India Appeals, 227.)

2. Q. (*a*) Is the Hindu law a personal or a local law? (*b*) Has a Hindu a freedom of choice as to the particular "shaster" by which he will be governed? (*c*) Can he import into any country to which he migrates the particular law of his own tribe? (*d*) And what is the presumption of law as to his having retained or changed the "*shasters*" of his birth.

A (*a*) A personal, not a local law; (*b*) yes; (*c*) yes; (*d*) the governing circumstance to be attended to in deciding by what law he is bound, being the intention, as manifested by the character of the purohit, ceremonies and usages which he, or his descendants after him, retain about him. The real test to be applied is, by what "*shasters*" the customs and rites of marriages and funerals are conducted. Occasional and daily religious services may be changed without effecting a corresponding change in a Hindu's legal liabilities.) (Koomudchunder Roy, *v.* Seetakant Roy, Suth. F. B. 75; Ranee Pudmavati *v.* Baboo Doolar Singh, 7 S. W. R., P. C., 41; Cowell's Hindu Law, vol. i., pp. 3 to 6.)

3. Q. What are the chief characteristics of the Hindu community at the present day?

A. An aggregation of families rather than of individuals. Communality and co-ownership, and its divisions into four great *castes*, parcelled out by reference to the principles of (1) Religion, (2) War, (3) Industry, (4) Servitude. (Cowell's Hindu Law, vol. i., pp. 66 to 8.)

4. Q. How many schools of law exists at the present day? Name them.

A. Five: (1) Bengal, (2) Mithila, (3) Benares, (4) Maharashtra, and (5) Dravida. But according to Mr. Mayne, there are properly two schools: the Bengal and the Benares.

5. Q. What are the authorities followed by the respective schools?

(1) The *Dayabhaga* with its recognized commentaries, the *Dayatatwa*, and the *Dayasangraha*, are the peculiar authorites of the school of Bengal. (2) In Mithila, the Vivada Chintamoni and other works are especially followed. (3) The school of Benares is chiefly governed by the Mitakshara,* whose authority is fortified by the works of Mitra Misser and Camalakara, the Viramitrodaya being the most celebrated amongst them. (4) The Parasara Madhaviya is the principal authority in the Dravida school. (5) The Mayukha is the standard work followed by the Maharashtra school.

6. Q. What are the sources of the Hindu law as administered in Hindu territories?

A. (1) The old traditional authorities; (2) the authoritative commentators; (3) the approved customs of the districts; and (4) (where all these fail), the exposition of law by learned Brahmins. (Cowell's Hindu Law, Vol. i., p. 17.)

7. Q. How are the members of a "gotra," or family, connected?

A. By blood-relationship, marriage, or adoption. (Cowell's Hindu Law, vol. i., p. 57.)

8. Q. Who is the "Guru" and who the "Purohit"? And what are their respective functions?

A. The "*Guru*" is the spiritual guide of the family. He is a man's *Guru* who, after going through the ritual, imparts to him the Veda. (1 Yajnavalkya 34.) And the "*Purohit*," the priest who efficiates at and presides over the performance of the religious ceremony. The former wield both a tem-

* In Western India, in questions of inheritance, the first place is assigned to the Mitakshara, and only a subordinate, though still an important one, to the Mayukha, on the authority of the responses delivered officially by the Shastris of the courts and oral statements of persons learned in the Hindu Law of this Presidency.—12, Bombay High Court Reports, p. 65.

poral and spiritul authority. They can expel a man from *caste*, or restore him: their benediction is equivalent to the remission of sins. The latter conduct worship and all ceremoines; assign names to new-born infants, and calculate their nativity; bless new houses, wells, and tanks; purify and consecrate temples; and conduct marriages and funeral ceremonies. (Cowell's Hindu Law vol. i., pp. 60 and 61.)

6. Q. What is the doctrine as to the payment of "Purohit's" fees?

A. The amount of the priest's fee is left to the conscience and the means of the person for whom his functions are performed, but the payment of some fee is essential to the efficacy of the ceremonies performed. (11, Bombay High Court Reports, p. 10.)

10. Q. What is the ordinary method of providing for the support of idols, priests, and worship? Is this method recognized?

A. By endowment. Property so dedicated is known as *dewuttur* property. Such endowments are recognized, so long as they appear to have been *bonâ fide* real, not nominal, endowments,—the criterion being publicity of the dedication or grant and the appropriation of the rents, issues, and profits to the purposes for which the grant purported to have been made. (Cowell's Hindu Law, vol. i., d. 66.)

11. Q. How many descriptions of "muths," or temples are there? and how does the office of "mohunt" devolve in each case?

A. Three. [1]. *Mouroosi*, [2] *Punchaite*, and [3]. *Hakimi*. In the first, the office is hereditary; in the second, elective; and in the third, vested in the ruling power, or in the party who endowed the temple. (Cowell's Hindu Law, vol. i., p. 70.)

12. Q. In what does the "*shraddha*," or funeral obsequy, consist? And what is the object of its performance?

A. These obsequies consist of oblations of food, libations of water offered to the manes of the Hindu's ancestors. The object in view is to effect, by means of oblations, the re-embodying of the soul of the deceased after burning his corpse. (Cowell's Hindu Law, vol. i, pp. 71—80.)

13. Q. Define "*stridhana*," and give its derivation.

A. From *stri*, female, and *dhana*, wealth. The separate property of a married woman, including gifts from her husband, his relations or her own, or any other acquisition. (Mac. H. L. 96, 109; Dayabhaga, chap. iv., s. i., v. 4; Cow. H. L. vol. i., 84.) What has been given [to a woman] by her father, her mother, her husband, or her brother, or received by her before the nuptial fire, or on occasion of her husband's marriage with another wife, and such like, is called *stridhana*. (Dhar. Sast., Yang., sloka 143.)

14. Q. State the different descriptions of *stridhana* in the Bengal, Madras, Bombay, and Mithila school.

A. They are the same in all four schools. The most comprehensive definition is given in the following text of Menu:—(1) What was given before the nuptial fire; (2) what was presented on the bridal procession; (3) what was given in token of love; and (4) what was received from a mother, a brother, or a father. (Mac. H. L. 41, 1870.)

15. Q. In the Bengal school does land given to a woman by her husband form part of her *stridhana*?

A. Yes; but she cannot alienate it. (Cowell's Hindu Law, vol. i., p. 84.)

16. Q. Can the wife alienate her *stridhana* during her coverture?

A. Over her *stridhana* generally the wife has sole power. She can alienate it during coverture. (Cowell's Hindu Law, vol. i., p. 48; ii., p. 32.)

17. Q. Is the property which a married woman inherits from her husband on his death without male issue part of her *stridhana*? What is the nature of her interest in it?

A. No; she does not attain a full proprietary right of inheritance, but is only entitled to enjoy the estate under the guardianship of the next heirs of the deceased. A widow can only enjoy the estate subject to the control of her guardians. (Cowell's Hindu Law, vol. i., p. 193.)

18. Q. Illustrate the doctrine of "*factum valet quod fieri none debuit*," and state to which of the schools it applies.

A. This doctrine is founded on a passage in the Dayabhaga, which says, "Slay not a Brahmin," but if a man should kill one, the murder is committed, and it cannot be undone. Equity, however, requires that the dependants of the slain man be compensated. Similarly, if a Hindu in Bengal should give away to stranger all his property, he commits a sinful act; but the gift, being made, cannot be revoked. This maxim applies to the Bengal school only. A Hindu in Bengal may leave by will, or alienate in his life-time, his possessions, whether inherited or acquired; and a gift or legacy, whether to a son or stranger, will hold good, however reprehensible it may be as a breach of an injunction and precept. (Cowell's Hindu Law, vol. i., p. 97.) The Bengal law simply lays down, "That the thing is done; it cannot be undone." *Factum est illud; fieri infectum non potest*; *i. e.*, if a man makes a *bonâ fide* gift complete in every respect to a stranger, it is lawful, though morally reprehensible. (3 L. M. R. 260.)

19. Q. Name the different species of marriage.

(1) Brahma; (2) Daiva; (3) Arsha; (4) Prajapatya; (5) Asura; (6) Gandharba, or love marriages; (7) Rakshasa, or forcible connection; and (8) Paisacha, where the marriage

has been effeted by fraud. The four first are peculiar to Brahmins; the fifth from is peculiar to Vaisyas and Sudras. (Mac. H. L. 62; Cow. H. L., vol. i., 164.)

20. Q. By what Act is the degradation of caste as a disqualification for inheritance abolished? And mention the Act which authorizes the re-marriage of widows, and state the provisions of the section.

A. (1) Act XXI. 1850; (2) Act XV. 1856, which says: "No marriage contracted with Hindus shall be invalid, and the issue of no such marriage shall be illegitimate by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindu law to the contrary notwithstanding. (section 1.)

21. Q. On what is the Hindu law of adoption based?

A. On the spiritual necessities of the Hindu, the primary object being to save from *Put*, or hell. The spiritual efficacy of the possession of a son, which in the remote ages was the paramount idea, has somewhat given place to the feeling that the existance of a son is desirable, because it renders the continued performance of rites, during the long period for which they are enjoined more secure, and because, to ensure the continuance of his name and family, is an object always dear to the mind of a Hindu. (Mac. H. L. 31; Cow. H. L., vol. i., 210.)

22. Q. Mention the different descriptions of property known to Hindu law.

A. (1) Into things personal, and [2] real; *i. e.*, things moveable and immoveable; (3) ancestral, and [4] self-acquired.

23. Q. Explain "Dwyamushayana," "Dattaka," "Kritrima," "Putra," "Patrica Putra."

A. [1] A child adopted after the ceremony of tonsure has been performed becomes a Dwyamushayana, or child of two

fathers. The absolute transfer being regarded as incapable of taking effect, such a child belongs to both families, inherits in both, and performs the obsequies in both. No one but the natural parents can give a child in adoption. The essential element in this species of adoption is an agreement, expressed or implied, between the natural and adoptive fathers, to this effect; "This is a son of both us." The adopted son still continues a member of his own family, and partakes of the estate of his natural and adopting father. [Cow. H. L., vol. i., 243, 302, 341; Mac. H. L., 74.] [2] The Dattaka Mimansa and the Dattaka Chandrika are the standard authorities on the law of adoption. Anitya Datta is the name given to a son adopted in the Dattaka, from a different Gotra, after he has received the tonsure in his natural Gotra. Dattaka, then, is a form of adoption, or son given. When this form is completed, it can never be revoked [Cow. H. L., vol. i., 16, 271, 342; Mac. H. L. 67.] [3] Kritrima, a form of adoption obtaining in the Mithila country, an innovation upon the established Dattaka form. The origin of the practice of this form of adoption is traceable to the prohibitory rule of *Vachespati, that a woman could* not, even with the previously obtained consent of her husband, adopt a son after his death in the Dattaka form. Colebrooke assigns its introduction to two pundits, whose motive was to save a confusion of families and names. To this form the only parties are the adopter and the adopted, and if he has attained his majority the assent of the adopted is essential. Such consent must be given in the life of the adopter. Equality of caste is the only condition of eligibility for a Kritrima adoption. [Cow. H. L., vol., i., 244, 261, 268, 299, 319, 321; Mac. H. L. 95 Cole. Dig., iv. 10; 1 Marshall, p. 95.] [4] Putra, a son. "Since the son [trayate] delivers his father from the hell named *Put*, he was therefore called Putra by Brahma himself." [Mac. H. L. 63; Menu, ix. 138.] [5] Patrica Putra is the appointed daughter; and

her son is equal to a son whom a man has begotten on his wedded wife of equal class. The term Patrica Putra includes four persons; viz.—(*a*) the appointed daughter; (b) her son; (*c*) her son when she was given in marriage with an express stipulation that her son should belong to her father; and (*d*) a Dwyamushyana. (Cowell's Hindu Law, vol. i., p. 212.)

23½. Q. Who is said to be an "*aurasa*" son?

A. An "*aurasa*" son is one born of a *dharma* wife. *Aurasa* is form *uras* "the best," being the first in order of sons. *Dharma* is a wife of the same caste as her husband, and wedded to him according to the *Brahma* and other improved forms of marriage (Dhar. Sast. Yagn. solka 128 and notes.)

24. Q. Define a "vested remainder" under the Hindu law,

A. A remainder to be vested under the law must be vested in interest. Hindu law knows nothing of a "vested estate" with a contingent interest. The Hindu law meaning of the word "vest," as applied to inheritance or estate, means the acquisition of an actual estate. Since under that law the estate cannot be carved out into parts or divisions by the creation of particular "estates" (in the English law sense of the term,) a remainder after an estate-tail, or other "limited inheritance," is not vested in law—it is contingent. A remainder must be vested in interest and possession in contemplation of law; enjoyment may be deferred, but possession is immediate in contemplation of law; ownership according to Hindu law is entire and unconditional, and not susceptible of small divisions and of portions. There is no difference between an estate vested in fee either in whole or in part, and an estate vested interest. In other words, "vested" is equivalent to unconditional. Hindu law does not countenance conditional gifts "as vested subject to be divested." (3 M. L. R. 259.)

25. Q. Explain "Nitya Dwyamushyana," and "Anitya Dwyamushyana," and state the broad distinctions between them?

A. The latter is distinguished from the former in that the former is incompletely son of two fathers, the latter absolutely son of two fathers. The broad distinction between them is, that the issue of the former belongs to the adoptive, and of the latter to the natural, family. (Cow. H. L., vol. i., 341, 342; Mac. H. L. 74.)

26. Q. What is the right of the parents with respect to giving a son is Dattaka adoption?

A. According to Menu, a father has absolute power to give, the mother only being able to do so with her husband's consent (9 Menu, verse 168). Besides this authority for the father's absolute power, there is the direct authority of the Dattaka Mimansa (sec. ix. verse 13), and the absence of any prohibition in the Dattaka Chandrika.

27. Q. What is the law under the Dayabhaga, and what under the Mitakshara, as to the power of a widow to adopt to her husband without his authority? Can the want of authority be supplied in any and what Presidencies and how?

A. The three rules which embrace the whole law on the subject are: (1) That the husband's permission is always a sufficient authority to his widow to enable her to adopt, except in Mithila, where the Dattaka form has in practice been abolished. (2) That such permission in Bengal is essential, and cannot be dispensed with under any circumstances. (3) That by the followers of the Mittakshara, both in the Benares and the Maharashtra schools, the consent of the husband's kindred may substituted when the husband has expressed prohibition, and has merely failed or omitted to give his section. (Cow. H. L., vol, i., 262; Mac. H. L. 85.)

28. Q. What is the present state of the law in Bengal, Madras, Allahabad and Bombay as to the legality of an adoption of an only son?

A. According to the High Courts of Madras, Bombay and Allahabad, the adoption of an only son is valid, but according to the Calcutta High Court, it is invalid. [Mayne, pp. 101—139.]

29. Q. What is the law with regard to the right of illegitimate sons to maintenance among,—[*a*] three regenerate classes; [*b*] Soodras?

A. The illegitimate son, even of a man of the three regenerate tribes, is entitled to maintenance. (Mutuswamy Tagavera Tettappa Naiken *v.* Venkataswarra Yettappa, 2 B. L. R. P. C. 15; Cow. H. L., vol. i., 136.) An illegitimate son born of a low woman has a right to maintenance. [Inderpan Valumgpatty Taver *v.* Ramasawmy Pandia Talser, 3 B. L. R. P. C. 4.] It is provided by law that the son by Soodra woman of a man belonging to any of the three superior classes is entitled to maintenance. The same rules that apply to illegitimate children by Soodra women are applicable also to the spurious offspring of women in the inverse order of the classes. (Cowell's Hindu Law, vol. i., p. 171.)

30. Q. What effect has the want of chastity on the right to maintenance of,—(*a*) a married woman; (*b*) a widow?

A. The adulterous wife must be maintained. (Cole. Dig. B. ii. c. iv. s. 2, verse 18.) But a woman divorced for adultery during her husband's life, and in unchastity after his death, is not entitled to maintenance after his death. (Cowell's Hindu Law, vol. i., pp. 135, 170.) See also answer to questions 32, 35, *post*.

31. Q. What power has a wife to bind her husband by her contracts?

A. The wife's power to pledge her husband's credit, or to render him liable on her contracts on the ground of an im

plied agency, is the same in Hindu as in English law. (Cowell's Hindu Law, vol. i., p. 166.)

32. Q. What is the widow's right to maintenance? Is it superior or not to the right of partition and alienation?

A. Under *Mitakshara* law a Hindu widow's maintenance is a charge upon the whole estate in which her husband had a share, and therefore upon every part thereof. (4 Bo. H. C. R. 273.) It is superior to the right of partition, also of alienation. The widow's maintenance is also, according to the Bengal school, charge upon the estate of her husband. (Cow. H. L. vol. i., 138.) A wife is, under the Hindu Law, in a subordinate sense, a co-owner with her husband; he cannot alienate his property, or dispose of it by will, in such a wholesale manner as to deprive her of maintenance. Where, therefore, a husband in his life-time made a gift of his entire estate, leaving his widow without maintenance, it was *held* that the donee took and held such estate subject to her maintenance. (I. L. R., 2 All. 315.)

33. Q. Who are the widow's legal guardians? and what is her obligation to reside with her guardians?

A. The members of her husband's family; and she forfeits her claim to maintenance by withdrawing herself from their protection. But if less than her proper amount is afforded to her, and she seeks shelter under the roof of her parents, this has been held not to forfeit her right to maintenance (Cowell's Hindu Law, vol. i., p. 138.)

34. Q. What is the widow's remedy for enforcing her right to maintenance?

A. According to the Bengal school, the ancestor's widow can follow the estate with her claim for maintenance out of it, and further there is the text of Katyaynna:—"Except his whole estate and dwelling-house, what remains after the food and clothing of his family, a man may give away, whatever it be, whether fixed or moveable; otherwise it may not be given." A Hindu widow can insist upon remaining in

the family dwelling-house, and can also insist upon being maintained out of the joint estate, into whosesoever hands that dwelling-house and estate may pass, unless when they are sold expressly to provide for the widow. [Cowell's Hindu Law, vol. i., p. 141.]

25. Q. What is the wife's right to maintenance?

A. The wife is entitled to maintenance. It has been held that a wife leaving her husband's house without sufficient cause, and especially if *she be an adulteress* cannot claim maintenance. [Ilata Shavata *v* Ilata Narayavan Nambri Divri, 1 Madras, 372.] She does not by a single act of disobedience, or even by leaving her husband's house and carrying on an independent calling, forfeit for ever her rights to maintenance. If she be ready to return to him, he is bound to maintain her. While apart from him, and unwilling to return, she is not entitled to be maintained by him. [Cow. H. L., vol. i., 142.] The rulings on this point are not unanimous.

36. Q. Besides the wife and mother, who are entitled to maintenance?

A. The step-mother, grandmother, son's widow, the unmarried daughter and sister not otherwise provided for; those who by reason of some incurable mental or physical disease are disqualified for inheritance; as also their children, wives, or unmarried daughters. With regard to outcasts and their issue, the authority of Yajnavalkya might be cited; but in their case maintenance is restricted to food and raiment. (Cowell's Hindu Law, vol. i., p. 149.)

37. Q. What is the widow's power of alienation?

A. She cannot aliene her husband's estate without the consent of the reversionary heirs. In default of reversionary heirs, the Crown, as the ultimate reversioner has the same power as the heir would have. Under the *Mithila* school she has power to consume, give, or sell the moveables,

but has no power over the immoveables beyond a moderate enjoyment of them, In Toolsey Dass *v.* Doocowerban, the Bombay High Court said she had "uncontrolled power over the movables, but nothing more than a life use in the immovable estate." Under the Bengal school the doctrine estabilshed was, that "the widow, in Bengal, has the entire right of property vested in her, both in the movable and immovable estate; that she is morally bound to take the advice of her husband's kindred, but is under no legal disability if she do not take or follow such advice." The Privy Council, in Kasheenath Bysack *v.* Hurrosundary Dasee, declared the widow entitled to the possession of both, and that she could not be deprived of it by husband's relations. Her right to possession is absolute, and cannot be restricted; and that she was only entitled to enjoy it according to the rights of a Hindu widow. Cowell's (Hindu Law, vol. i., p 198.)

39. Q. What is the character of the Hindu system of adoption?

A. Essentially a contract between parents, who assume to give and take the absolute property of a child. Neither registration, nor any written evidence of the act, nor the sanction of any Court of Justice, or any ruling power, is essential to its validity. Nevertheless, the utmost publicity is usual, and its absence suspicious. (Cowell's Hindu Law, vol. i., pp. 224 to 226.)

39. Q. How far is the ceremonial incidental to an adoption, any portion of such ceremonial necessary in order to effect a valid adoption?

A. If once the fact of adoption is established, the Courts will not inquire into the preformance of the secular and possibly not into tne perfermance of religious ceremonies, merely for the purpose of testing its validity. There must be gift and acceptance manifested by some *overt* act; that

overt act, as prescribed by Menu, being the pouring of water. Beyond this there is nothing absolutely necessary. (Cow. H. L., vol. i., 227; 1 Str. H. L. iv. 94; 9 Menu, verse 168.)

40. Q. What constitutes adoption for civil purposes?

A. Gift and acceptances *actual*; constructive gift and acceptance is not sufficient. (*Vide* answer to question 39; also Cowell's Hindu Law, vol. i., pp., 230—234.)

41 Q. Who may adopt? And who not?

A. Any Hindu destitute of male issue, that is, to whom no son has been born, or whose son has died. (Man. H. L. 33.) "By a man destitute of a son only, must a substitute for the same always be adopted." (Dattaka Mimansa, chap. i., v. 3.) A man adopting must be of age. In the case of a woman it must be with consent of her natural protector; in Bengal, her husband exclusively. Unmarried men may adopt. Impotent and excluded persons may adopt.

Minors and lunatics may not adopt. (Cow. H. L., vol. i., 251—256; Man. H. L. 36—46.)

42. Q. Who are "Sapindas," "Samanodakas," "Saculyas," "Bandhus"? that is, define these terms.

A. "*Sapindas*" of two description—through consanguinity *and* connection by funeral oblations. The word in its ordinary meaning denotes connection through the *pinda*, or funeral cake.

"*Samanodakas.*"—Kindred connected by a common libation of water,

"*Saculyas.*"—The cognates above the fourth decree in ascent, or distant kinsmen.

"*Bandhus,*" *i. e.*, kinsmen sprung from a different family, but allied by funeral oblations. (Cowell's Hindu Law, vol. i., pp. 124—130.)

43. Q. What is meant by "heritage" in Hindu law?

A. That wealth which becomes the property of another solely by reason of relation to the owner. (Mac H. L. 137.)

Heritage (Daya) is so defined in the Mitakshara: "The owner" is of course the *previous* owner.

44. Q. What are the rights of the natural father to inherit property acquired by his son through adoption?

A. None. The members of the family which he has quitted have no title to succeed to such estate. They are entire strangers to his estate ancestral or self-acquired. (Cowell's Hindu Law, vol. i., p. 357.)

45. Q. What is the point, with reference to adoption, which has been decided in Runganma *v.* Atchama, 4 Moore's Ind. Ap., p. 1?

A. The invalidity of a second adoption while the first adopted child is living. (Cowell's Hindu Law, vol. i., p. 292.)

46. Q. When may the son be adopted by two individuals?

A. The *dwyamushayana*, except, perhaps, in the case of the only son of a brother, may be said to be abolished. (Cowell's Hindu Law, vol. i., p. 342.)

47. Q. What is the decision of the Privy Council in the case of of Dhurm Dass Panday *v.* Musst. Shama Soonderee Debiah, 3 Moore's Ind. Ap. 229?

A. The result of an act of adoption by a Hindu widow is, that the whole property is divested from her, and vested in the adopted son. She retains possession of her husband's property not as heir but as guardian and trustee of the adopted son. Her interest in the estate is cut down to the widow's right to maintenance. (Cowell's Hindu Law, vol. i. p. 283.)

48. Q. (*a*) What is the effect of adoption? And (*b*) in determining the validity of the adoption, what is a court of law bound to inquire into;

A. (*a*) As respects *Kritrima* adoption, a son so adopted retains the right of succession and of presenting the funeral

cake in his natural family, while he also acquires the same rights in his adoptive family. As respects *Dattaka* adoption, a child so adopted ceases to have any connection with his natural family, except that he cannot marry a member of it. He is incapable of performing the funeral rites of his natural father, and ceases to have any claim upon the family or estate. He represents the real legitimate son his relationship to his adoptive mother, and her ancestors are his maternal grandsires. (*b*) The adopter having no male issue; the consent of the parties; the child being eligible; gift and acceptance.

48. Q. What are the three chief points to be considered in actions brought against the heirs of an estate?

A. The debt must be for a good consideration; must be a ready-money transaction; if incurred for marriage or any other ceremonies, it must have been reasonable in amount. (Man. H. L. 75.)

50. Q. How long does minority last? At what age does it cease according to the several schools of law? State any special enactments you remember which affect the time at which majority is attained.

A. According to Hindu law, minority lasts up to the completion of the sixteenth year generally throughout India, except in Bengal, where it lasts up to the completion of the fifteenth year. But by s. 3 of the Indian Majority Act, 1875, it is provided that—"Every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, shall notwithstanding anything contained in the Indian Succession Act (No. X. of 1865) or in any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years and not before. Subject as afore-said, every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before."

51. Q. Who may contract marriage?

A. The restrictions upon the right to contract a marriage depend upon considerations of relationship or caste. A woman may not marry a man of a caste beneath her; a man may marry in his own caste, or in an inferior one. In the present age, according to Mr. Sutherland, marriage with one unequal in class is prohibited. The High Court of Bengal affirmed this principle in the case of Nelaram Nedgol *v.* Termam Bennen (9 S. W. R. 552); but the Madras High Court took a different view. They say, although the law recommends a marriage with a woman of equal class as a preferable description of marriage, yet the marriage of a woman of a lower caste than himself appears not to be an invalid marriage, rendering any issue illegitimate. (Pandaiya Tilava *v.* Palitilava, 1 Madras, 478; Cowell's Hindu Law, vol. i., p. 167.)

52. Q. If property be derived by the wife from a stranger, or earned by herself, in whom will it vest on her death? Will it follow the line of succession of *stridhana*?

A. The general rule is, that it vests in the husband, and is unreservedly at his disposal. It will not follow the line of Stridhana. (Cowell's Hindu Law, vol. ii., p. 27.)

53. Q. What powers have the husbands and others over woman's property?

A. The *stridhana* belongs to the woman exclusively, but the husband has a concurrent power over it, so that he may use it in any exigency for which he has not otherwise the means of providing, and this without being accountable afterwards for what he may have so applied. (Strange, vol. i., p. 27; Cowell's Hindu Law, vol. ii., p. 28.)

54. Q. State concisely the effect of the decision in Abraham *v.* Abraham, 2 Moore's Ind. Ap., p. 195.

A. Parcenership may be put an end to by severance effected by partition. It is equally put an end to by a sever

ance which the Hindu law recognizes and creates; *e. g.*, an outcast, one who has renounced his religion or who has become a convert to Christianity. (Cowell's Hindu Law, vol. ii., p. 50.)

55. Q. What is the rule laid down by the Privy Council in the Shiva Gunga case with regard to the undivided portion of an estate?

A. That the right of survivorship applied only to undivided property. (Cowell's Hindu Law, vol. ii., pp. 107—112.)

56. Q. What is the effect of an agreement to divide?

A. For a definition of 'partition' see Cowell's Tagore Lectures, 1871, pp. 60 to 64. The effect of such an agreement in Bengal, is the actual ascertainment of each member's shares, with a view to separate enjoyment. In the other schools, the effect appears to be a division of title, not necessarily a division of enjoyment. In the latter it is more a declaratory decree than a specific one. (Cowell's Hindu Law, vol. ii., pp. 60—64.)

57 Q. What are the essentials in a civil point of view of a contract of marriage?

A. Betrothal. The matrimonial contract in itself fixes the relation of the contracting parties as married. The binding circumstances essential to the completion of a marriage are gift and acceptance of the girl. (Mac. H. L. 21; Str. H. L. 7.)

58. Q. What would a Court of Justice consider a justification of the absolute severance of the contract of marriage?

A. Adultery of the wife. (Mac. H. L. 22.)

56. Q. What is the meaning of the "Reflection of a son"?

A. The son of a woman upon whom, if he were begotten by the adoptive father he would not be the production of an incestuous intercourse. (Mac. H. L. 47.)

60. Q. What is the ruling canon with respect to persons who may be adopted?

A. That no boy can be adopted with whose mother the adopter could not have married. (Mac. H. L. 47.)

61. Q. When an adopted son dies without issue, to whom will the property which he inherited from his adoptive father pass?

A. To the heirs of the latter. (Mac. H. L. 54.)

62. Q. Suppose an adoption should prove invalid, what would be the rights of the boy with reference to the property of his adoptive and natural fathers?

A. An invalid adoption does not sever the person so adopted from his natural rights. (Bawani Savkara Pandit *v.* Ambabay Ammal, 1 Mad. H. C. R. 363.)

63. Q. Under what circumstances does the order of succession to Stridhan vary?

A. According to the condition of the woman and the means by which she becomes possessed of the property, (Mac. H. L. 121.)

64. Q What has the Privy Council declared in the case of Doorendronath Roy *v.* Musst. Heramonee Burmoneah to be the primary consideration in determining the rule which is to govern the right of succession?

A. The right to perform the Shraddha.

65. Q. Can an agreement between two heirs to divide be enforced by an action at law by the widow of one of them?

A. Yes. (Mac. H. L. 193.)

66. Q. What power of alienation has a man under the Bengal school? and by whom may joint property be alienated?

A. A man may dispose of his property, moveable or immoveable, ancestral or self-acquired, as he pleases, by gift, sale, or will. (Cowell's Hindu Law, vol. ii., p. 4.) By all the members of the family jointly. (*Id.* 70.)

67. Q. What was the point settled by the Bombay High Court in Trimbak Anant *v.* Gopal Shet regarding the power to carry on a family trade?

A. That, in an undivided Hindu family comprising infant members, the manager might sell family property to carry on the trade, if such an act be necessary, and for the general good. (Cowell's Hindu Law, vol, ii., p. 9.)

68. Q. What is the point of difference between the Bengal and Mitakshara schools as to the restrictions imposed on alienation by a widow ?

A. The former school restricts her with regard to moveables and immoveables ; the latter only enforces those restrictions with respect to immoveables, both ancestral and self-acquired. (Cowell's Hindu Law, vol. ii., p. 17,)

69. Q. What is necessary to effect a valid transfer of property ?

A. Relinquishment *and* acceptance. Mere relinquishment is not sufficient. The donee must be a sentient being, and must be clearly designated. (Cowell's Hindu Law, vol. ii., p. 38.)

70. Q. What is the mother's power to alienate her deceased husband's estate during her son's minority ?

A. Such alienation to raise means to pay the father's debts and for support held to be legal under Hindu law. (Cowell's Hindu Law, vol. ii., p. 19.)

71. Q. Are "benamee" transactions as to alienations valid ? and in such a case what is the criterion of ownership ?

A. Yes. The criterion is by whom was the purchase-money paid. (Cowell's Hindu Law, vol. ii., p. 39.)

72. Q. What is the mode in which a transfer or conveyance may be effected as between Hindus by the Hindu law ?

A. It is not actually necessary that a contract or conveyance should be in writing ; proof of a verbal grant of land, whether by exchange, sale, or gift, is good when followed by possession. Such gift resembles a grant by the English law

of chattels, real or personal, before the Statute of Frauds' (Cowell's Hindu Law, vol. ii., p. 43.)

73. Q. What is the rule of law as to the construction of deeds when produced ?

A. That they ought to be liberally construed. The literal sense not to be regarded so much as the real meaning of the parties. (Cowell's Hindu Law, vol. ii. p. 43)

74. Q. Name some of the things which by Hindu law are deemed to be impartible ?

A. A Raj ; a Polliam, *i. e.*, a tract of country subject to a petty chieftain ; self-acquisitions made without aid from the joint stock of the undivided family ; buildings constructed by one member on the joint estate ; gains of science. (cowell's Hindu Law, vol. ii., pp. 52—59.)

75. Q. Who has a right to call for a partition ?

A. The doctrine in Bengal is, that every member of a joint undividid family has an indefeasible right to demand partition of his own share. The other members must submit *nolens volens.* (Cowell's Hindu Law, vol. ii., p. 71.)

76. Q. What is the effect of two widows of the same man partitioning their deceased husband's estate ?

A. The effect is merely to divide the enjoyment ; the title remains joint, the surviving widow takes the whole. (Cowell's Hindu Law, vol. ii., p. 86.)

77. Q. After a partition, can there be a reunion ? if so, what constitutes a reunion ?

A. Yes ; reunion is recognized by Hindu law. To constitute reunion there must be a junction of estate ; living in one residence or carrying on joint trade is not sufficient. A reunion by descendants appears not to be a reunion in the sense of the Hindu law. (Cowell's Hindu Law, vol. ii., pp. 87—94).

78. Q. What are the causes which lead to exclusion from inheritance ?

A. (1) Those which spring from a man's conduct and lead to his expulsion; and (2) those which are derived from a man's natural state or condition disqualifying him for the performance of those spiritual acts which are to benefit the soul of the deceased. [Cowell's Hindu Law, vol. ii., p. 186.]

79. Q. Name some of the defects of natural state or condition which disqualify a man from inheriting?

A. Idiocy, blindness, dumbness, leprosy, unchastity, offspring of incestuous intercourse [Cow. H. L., vol. i., 189—196]; an impotent person, an outcast, one lame, born blind or deaf, or who has lost the use of a limb, a madman, an idiot, one incurably diseased (Mac. H. L. 86.) Besides the above, Strange gives—a devotee, illegitimate offspring, save among Sudra. (S. Mac. H. L. 39.)

80. Q. A died leaving a widow and one son B; the widow of C re-married in her son B's life-time; after her re-marriage B died. At B's death, was his mother entitled to succeed to his estate, or had she lost her interest as her son's heir by her re-marriage?

A. Under the provisions of Act XV. 1866, she is entitled to succeed to her son B's estate. (Cow. H. L., vol. i., 199.)

81. Q. How many modes are there of acquiring property?

A. Seven. (1) Succession; (2) occupancy or donation; (3) purchase or exchange; (4) conquest; (5) lending at interest, husbandry, or commerce; [6] acceptance of presents; and [7] from respectable men. Inst. Men. 239, Mac. H. L. 66.]

82. Q. Name the encumbrances with which an estate is chargeable?

A. [1] Debts and other obligations in the nature of legacies; [2] certain specific duties to be provided for out of the estate where it has descended to a single heir, and out of the common fund where it has vested by survivorship in undivided co-heirs; [3] maintenance of all requiring and entitled to it. [Mac. H. L. 69.]

83. Q. How do sons inherit who are born after partition?

A. They succed to the father's share, to the exclusion of the divided sons. (Mac. H. L. 146).

84. Q. What is the status and right of the sons of an Englishman by a Brahman woman living apart from her husband?

A. The sons are Hindus. [Mac. H. L. 147.]

85. Q. What are the modes of disposition of property recognized by the Hindu law?

A. (1) By partition; (2) by alienation or gift (3) by will, (Mac. H. L. 191,)

86. Q. What is the presumption of law with respect to a joint undivided family as to the estate?

A. That the whole property is joint estate. The onus lies on the party claiming to establish the fact that the property ir his separate property. (Mac. H. L. 192.)

87. Q. What is the widow's interest in the accumulations of her husband's estate?

A. According to all the older authorities on Hindu law, accumulations must be treated in the same way as the *corpus*; and by the ruling in *In re* Grose *v.* Amritamyi Dasi (4. B, L. R. 40) it was held that it should be so treated in the absence of any distinct authority to the contrary. (Cowell's Hindu law, v. i., p, 203.)

88. Q. If a man die leaving more than one widow.—say three widows—how does his property vest in them?

A. The property is considered as vesting in only one individual; the survivor or survivors take the property on the death of either of the widows, and no part vests in the other heirs of the husband until after the death of all the widows. (Cowell's Hindu law, vol. i., p. 104, and see also answer to question 76, *ante*.)

89, Q. A man leaves three widows,—are they entitled by right to a partition of their husband's estate?

A. No, not entitled. They can by agreement provide for the distributive enjoyment by an apportionment between themselves, but cannot interfere with one another's right to survivorship, nor affect the rights of their husband's heirs to succeed to the whole estate at the death of the last surviving widow. (Cowell's Hindu Law, vol. i., p. 207.)

90. Q. Under what circumstances may a man give his widow power to adopt? and when does a man's right to make a second adoption accrue?

A. In case of the failure at any time of his legitimate male issue, whether begotten or adopted. If he survives the first adoption. (Cowell's Hindu law, vol. i., p. 276.)

91. Q. Is there such a thing as conditional adoption, or a conditional power to adopt. If so, what legally forms a condition on the happening of which such authority can be exercised?

A. No such thing as conditional adoption; but a conditional power to adopt is of frequent occurrence, and extends to legalize the practice of successive adoptions. The condition must be the death of one son before another can be adopted. No other circumstances, such as disagreement between the son and his adoptive mother or step-mother, are proper conditions. (Cowell's Hindu Law, vol. i, p. 276.)

92. Q. To what class of property does the Hindu's power of testamentary disposition apply?

A. Under the Mitakshara school, throughout Bengal, a man, who is the absolute owner of property, may dispose of it by will as he pleases, whether it be ancestral or not. Even in Madras it is settled that a will of property *not ancestral* may be good. With regard to ancestral property, the Privy Council laid down that it is subject to be disposed of by will, unless by reason of some inherent peculiarity it be withdrawn from the testamentary power. The broad and general principle appears to be, that in all cases where a

man is able to dispose of his property by act *inter vivos*, he may also dispose of it by will. [Cowell's Hindu Law, vo. ii., pp. 232—239.]

93. Q. What is the limit of the Hindu's testamentary power? Or, in other words, what is the limit of his disposing power? and how is this power regulated?

A. The Hindu Will's Act, XXI. of 1870, has placed this power under statutory regulation so far as regards wills executed after the 1st September, 1870, in the Lower Provinces of Bengal, and in the towns of Madras and Bombay; otherwise, the extent of the testamentary power of disposition by Hindus is regulated by Hindu law, [Cowell's Hindu Law, vol. ii., pp. 240—263.]

94. Q. Can trusts be created by will? if so, to what extent?

A. In *In re* Kumara Asima Krishna Deb *v.* Kumara Kumara Krishna Deb, it was laid down that, "putting out of the question the case of religious endowments, a devise by a Hindu which would be void as a condition is void in the shape of a trust." There is nothing contrary to the spirit and principles of the Hindu law in a devise to trustees which gives a beneficial interest to a person to whom it might have been given by a simple devise without the intervention of trustees. [Cowell's Hindu Law, vol. ii., pp. 252—260.]

95. Q. Can a Hindu by will create a qualified or particular estate?

A. There is nothing in the spirit or principles of Hindu law against the creation of particular estates. In the case of Rewun Persad *v.* Musst. Radha Beeby, the Privy Council held that the widow took an estate for life, and that the two sons of the testator's brother each took a vested interest in a moiety of the estate so devised to the widow, expectant upon the termination of her life-interest therein. [N. B.—In this case all the devisees were in existence at the time of the testator's death.] [Cowell's Hindu Law, vol. ii., p. 261.]

96. Q. Can a Hindu by his will create a prerpetuity?

A. In Juggutsoondery's case (8 M. I. A. 66) the Judicial Committee gave effect to the rule against perpetuities. By the latest decisions it appears that "the extent of the testamentary power of disposition by Hindus must be regulated by Hindu law." So that, whether the Hindu law warrants the creation of a perpetuity, either by a will or deed of gift *inter vivos*, must depend upon the Hindu law alone. (Cowell's Hindu Law, vol. ii., p. 262.)

97. Q. State generally the changes effected by Act XXI. of 1870, regulating the mode of drawing up and executing of a Hindu's will.

A. (1) It abolishes, within the territories subject to the Act, nuncupative wills from the date mentioned in the Act: (2) the sections in the Indian Succession Act relating to privileged wills, which alone could be by word of mouth, are not by the Hindu Wills' Act made to apply to the case of Hindus; (3) the only sections* made applicable to them provide that a testator *must* execute his will by signing or affixing his mark to his will, or authorizing some other person to sign for him in his presence; (4) and with reference to attestation, it is now the law that a Hindu will, affected by the Hindu Wills Act, must be attested by two or more witnesses, each of whom must have seen the testator duly execute the will by himself or by his deputy, &c. (Cowell's Hindu Law, vol. ii., pp. 270—272.)

98. Q. What are the powers inherent in the offices of executor or administrator of the will of a deceased Hindu?

A. They stand in the position of ordinary managers; their powers being those which are incident to that position unless in the case of a will, they are, by the terms thereof restricted or enlarged. An executor, moreover, takes no estate in his capacity of executor; the title to the estate of the deceased vests in him, as trustee thereof only so far as

* Sections 50, 51, 57, 58, and 59, Indian Succession Act.

the testator has so directed. (Cowell's Hindu Law, vol. ii., p. 278.)

99. Q. What is the position of the executor and administrator under the Hindu Wills' Act?

A. He becomes the statutable representative of the deceased. He is the deceased's legal representative for all purposes, and all the deceased's property vests in him as such; and, further, the appintment may be express or by necessary implication. (Sections 179 and 182, Indian Succession Act.)

100. Q. What are the executor's administrator's powers?

A. (1) He has the same power to sue in respect of all causes of action that survive the deceased; (2) to distrain for all rents due to him at the time of his death as the deceased had when living; (3) and also power to dispose of the property of the deceased, either wholly or in part, as he think fit. (Section 267, 269, Indian Succession Act.)

101. Q. What are the executor's or administrator's duties?

A. He is bound, within six months of probate or administration, to exhibit to the Court from which he got such grant an inventory containing a full and true estimate of all the property in possession, and all the credits and debts; and in like manner, within twelve months, to exhibit an account of the estate, showing the assets to hand and how they have been applied or disposed of. (Section 277, Indian Succession Act.)

102. Q. Are there any provisions or is there any presumption under the Hindu law with regard to executors *de son tort*?

A. With regard to executors *de son tort*, the Hindu law makes no provision and raises no presumption. (Cowell's Hindu law, vol. i., p. 284.)

103 Q. What are the most distinctive features of the Hindu law?

A. The undivided family system, the order of succession and the practice of adoption—(Mayne, s. 7.)

104 Q. What are the two great categories of primeval authority in Hindu law? Give an account of them.

A. The *Sruti* and the *Smriti*. The *Sruti* is that which was seem or perceived, in a revelation, and includes the four Vedas. The *Smriti* is the recollection handed down by the Rishis, or sages of antiquity. The former is of divine, the latter of human origin. Where the two conflict, if such a conflict is conceivable, the latter must give away. Practically, however, the *Sruti* has little, or no, legal value. It contains no statements of law, as such, though its statements of facts are occasionally referred to as conclusive evidence of a legal usage. Rules, as distinct from instances, of conduct are for the first time embodied in the *Smriti* (Mayne, s. 16.)

105 Q. Who may adopt under the Hindu law, and under what circumstances?

A. Any person who has neither son, nor grandson, nor great-grandson, can adopt a son. Because any one of such persons is his immediate heir, and is capable of performing his funeral rites with full efficacy. But the existance of a great-great-grandson, or of a daughter's son, is no bar to an adoption. Still less the previous existence of issue who are dead. A man cannot have two adopted sons at the same time, though of course he may adopt as often as he likes, if at the time of each successive adoption he is without issue. And where an adoption is invalid by reason of the concurrent existence of a son, natural or adopted, the death of the latter will not give validity to a transaction which was an absolute

nullity from the first. If the son, natural or adopted, became an outcast, and therefore unable to perform the necessary funeral rites, an adoption would be lawful. An adoption by a bachelor, or a widower, is valid. Pregnancy of the wife is no bar to adoption. Where a person is disqualified from inheriting by any personal disability, such as blindness, impotence, leprosy, or the like, he may adopt after having performed the necessary expiation; when he had done so, the adoption was vaild. When he had not done so, or where the disease was such as to be inexpiable, the adoption was invalid, as until expiation the adopter was unable to perform the necessary religious ceremonies. An adoption by a widow living in concubinage is invalid, as she is unfit to take part in any religious ceremony. An adoption by a minor, and an authority to adopt given by him, will be valid. provided he has attained years of discretion. As an adoption is made solely to the husband and for his benefit, he is competent to effect it without his wife's assent, and notwithstanding her dissent. For the same reason, she can adopt to no one but her husband. An adoption made to herself, except where the Kritima form is allowed, would be wholly invalid. Nor can she ever adopt to her husband during his lifetime, except with his assent. In the case of an adoption by a widow, the husband's assent is required, in Bengal and Benares; —the consent either of the husband or of his sapindas is sufficient, in southern India;—on consent is required, in Western India;—no consent is sufficient, in Mithila. (Mayne, as. 95—99.)

106. Q. Who may be taken in adoption?

A. The nearest male *sapinda* should be selected, if suitable in other respects, and if possible a brother's

son, as he was already in contemplation of law a son to his uncle. But it is now settled that the adoption of a stranger is valid, even though near relatives, otherwise suitable, are in existence.* No one can be adopted whose mother the adopter could not have legally married. The adopted son must be of the same class as his adopting father; that is, a Brahmin may not adopt a Kshrtriya, or *vice versa*. As the chief reason for adoption is the performance of funeral ceremonies, it follows that one who, from any personal disqualification would be incapable of performing them, would be an unfit person to be adopted. (Mayne, ss. 118—121.)

107 Q. Who may give in adoption? and under what circumstances?

A. No other relation but the father or mother can give away a boy. The parent cannot delegate their authority to another person, The father has absolute authority to dispose of his son in adoption, even without the consent of his wife. The wife cannot give away her son while her husband is alive and capable of consenting, without his consent; but she may do so after his death, or when he is permanently absent, as for instance an emigrant, or has entered a religious order, or has lost his reason. (Mayne, s. 116 A.)

108 Q. Is the consent of the Revenue Board necessary in any case of adoption?—If any, state it.

A. The consent of the Revenue Board is necessary to an adoption by a person whose estate is under the actual management of the Court of Wards. (Mayne, s. 117.)

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* 1 W. McN. 68; 2 stra. H. L. 98. 102; Gocoolanund v. Wooma Daee, 15 B. L. R. 405 S. C. 23 Suth. 340; affd. *sub nomine*, Uma Deye v. Gokoolanund. 5 I. A. 40, S. C. 3 Cal. 587; Babaji v. Bhagirathi 6 Bom. H. C. (A. C. J.) 70. These authorities must be taken as overruling the case of Ooman Dut v. Kunhia Singh, 3 S. D. 144 (193).

109 Q. What are the ceremonies necessary to an adoption?

A. Amongst Sudras, no ceremonies are necessary in addition to the giving and taking of the child in adoption. Whether this rule applies to the superior classes seems to be still unsettled. The *datta homam*, or oblation to fire, though a most important part of the rite in the case of the three higher classes, has been held to be a mere matter of unessential ceremonial. If the omission of the ceremonies has been intentional, with a view to leaving the adoption unfinished; or, if from death, or any other cause, a ceremony which had been intended has not been carried out, no change of condition will take place, even though the ceremonies which have been omitted might lawfully have been left out. Because the mutual assent, which is necessary to a valid and completed adoption, has never taken place. And even in cases where giving and receiving are sufficient, there must be an actual giving and receiving. A more symbolical transfer by the exchange of deeds would not be sufficient. (Mayne, ss. 136—139.)

110 Q. State generally the result of an adoption.

A. It transfers the adopted son out of his natural family into the adopting family, so far as regards all rights of inheritance, and the duties and obligations connected therewith. But it does not obliterate the tie of blood, or the disabilities arising form it. Therefore, an adopted son is just as much incapacitated from marrying in his natural family as if he had never left it. Nor can he himself adopt a person out of his natural family, whom he could not have adopted if he had remained in it.—(Mayne, s. 147.)

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